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No. _____

In the
Supreme Court of the United States

STEVEN J. PARR

Petitioner,

- v. -

UNITED STATES OF AMERICA

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the "true threat" doctrine, as articulated by this Court in *Virginia v. Black*, 538 U.S. 343 (2003), requires a speaker to have a subjective intent to threaten in order for the speech to be constitutionally proscribable under the First Amendment, or whether the speech need only be objectively threatening?

II. Whether, under the First Amendment, the government may introduce testimonial evidence of prior statements and actions unknown to the recipient of the alleged threat in order to establish a subjective intent to "threaten"?

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JURISDICTION

The court of appeals entered judgment on September 18, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STAUTORY PROVISIONS

The First Amendment to the United States Constitution provides "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

18 U.S.C. § 2332a is reprinted at App. 85a-88a.

STATEMENT OF THE CASE

I. Factual Background of the Prosecuted Threat

In August of 2004, while serving out the end of a two-year sentence for marijuana distribution at the Oshkosh medium security prison in Oshkosh, Wisconsin, defendant Steven J. Parr was assigned a new cellmate. Trial Transcript Vol. 1 ("Tr. 1"); 43; Tr. 2; 266. This new cellmate, John Shultz, was serving sentences for multiple sexual assaults and attempted child enticement. Tr. 2; 266. Shultz was also facing the possibility of indefinite civil commitment following his release from prison pursuant to Chapter 980 of Wisconsin General Laws. Tr. 2; 258-60.

On August 23, 2004, 28 days before Parr's scheduled release to a halfway house, Shultz wrote a letter to the FBI alleging that "somebody is making plans to blow up the federal building." App. 3a, 49a. The federal building in question was located in Milwaukee, and this alleged "somebody" was Schultz's cellmate, Parr. App. 3a. Schultz described Parr's alleged plan as a "serious threat," and explained that Parr, "told me, swor[e] to me, that he is going to get you guys." Trial Exhibit 1 ("Tr. Exh. 1") 6-7. Shultz further asserted that Parr was a self-professed "follower" of the domestic terrorist Timothy McVeigh. App. 3a. FBI agents subsequently convinced Shultz to wear a wire and to induce Parr to repeat the alleged threats against the federal

building in Milwaukee. Tr. 2; 290-91, 310. Shultz agreed, and on September 20, 2004, the day before Parr's scheduled release, FBI agents outfitted Shultz with a recording device. App. 3a, 48a.

Shultz recorded over four hours of conversation, much of which involved joking and discussion of the trials and tribulations of prison life. Tr. Exh. 2A. After an initial reference to the alleged plot fail to elicit the desired response, approximately two hours into the conversation, Shultz began questioning Parr about how to construct a silencer for a gun and how and where he learned about various chemical reactions that could be used to make bombs. Tr. Exh. 2A; 21, 24-36. Parr responded that much of what he knew he learned either from the *Anarchist's Cookbook*, an underground anti-government publication, or from a basic course on chemistry in college. Tr. Exh. 2A; 22-25. Parr had in fact taken only one chemistry course in college—where he received an "F" on his first assignment—ultimately dropping out of both the class and college shortly thereafter. Tr. 3; 327-28. Indeed, Shultz, himself a college graduate with a minor in chemistry, would later testify at trial that Parr's knowledge of chemistry was "kind of a joke," and that he often amused himself by correcting Parr's chemistry and observing Parr's dumbfounded reactions. Tr. 2; 264-65, 269-70. The two went on to discuss Parr's exploits with a number of small-scale explosives Parr claimed he had constructed at his

home. Tr. Exh. 2A; 37-55. Parr made no implicit or explicit threats in describing his experiences with small-scale explosives, however.

Approximately half an hour later, Parr left the cell. Tr. Exh. 2A; 53. Shultz, narrating events unfolding to the FBI agents listening in, explained that Parr was "gonna get his pill . . . And his pill's gonna kick in and I'm just gonna get him talkin' like you wouldn't believe." Tr. Exh. 2A; 53-54. Shultz was referring to the fact that Parr had left the cell to take prescription Quetiapine, a drug commonly used to treat mood and anxiety disorders, including bi-polar disorder. Tr 3; 500. Shultz also explained to the FBI agents that "You wanted a homerun. You're gettin' a home run;" and that "[I'm] [t]akin' a big risk for you guys." Tr. Exh. 2A; 54.

Upon Parr's return, Shultz began questioning him about how to build a bomb big "enough to blow up my parole building, my parole officer's building." Tr. Exh. 2A; 54. After discussing Parr's opinion on a number of options, the conversation shifted to a bomb Parr allegedly constructed out of a cosmetic face cream can to disfigure a former girlfriend; one he "chickened out" on actually using. App. 4a. Shultz then asked Parr "Why didn't [sic.] bomb anybody if you were makin' all these fuckin' bombs? What are you waiting for"? Parr replied that "I didn't wanna, I just, I didn't wanna hurt no one." Tr. Exh. 2A; 73. Shultz then stated "[y]ou don't give a

fuck about hurtin' anybody when you do the federal building." Parr replied that this was "different" and that his attitude towards the federal government was "changing" for the worst. Tr. Exh. 2A; 73.

The worsening attitude Parr referenced stemmed from his belief that the federal government was responsible for "taking away" his son, after a paternity suit filed by a former girlfriend. Tr. Exh. 2A; 98. Although Schultz pointed out that Parr's anger towards the federal government was misplaced since it was Wisconsin, not the federal government, that divested Par of custody, Parr explained he believed "[t]he states are subservient to the feds," and that the state government was just the "messenger." Tr. Exh. 2A; 98-99. Accordingly, Parr explained that the loss of his son was "the straw that broke the camel's back," with regards to his attitude towards the federal government. Tr. Exh. 2A; 98. Parr subsequently admitted that he was fascinated by violent acts towards the government, like those of Timothy McVeigh, that "would change the attitude of the country," and "get a lot of people motivated." Tr. Exh. 2A; 98-101. When asked by Schultz if he "would like to be the next McVeigh," in this regard, Parr didn't object, stating: "[y]eah, the next McVeigh." Tr. Exh. 2A; 101.

While inducing Parr to discuss his anger towards the federal government, Shultz told Parr he wanted to know more about a "urea bomb," because

"this is the one I think I can make." Tr. Exh. 2A; 74. Shultz explained that he wanted to know about the bomb because "I saw one of those 20/20 or Discovery channel . . . shows and they used urea." Tr. Exh. 2A; 86. Shultz then inquired if Parr "could make a bomb just like what they blew up in there," and if "just a van full" would be enough to blow up the Milwaukee Federal building Schultz wanted to continue discussing. Tr. Exh. 2A; 86.

Despite Shultz's prompting, by this point in the conversation Parr had not volunteered a detailed version of the allegedly extensive plan of bombing the Milwaukee federal building. Accordingly, Shultz began pressing Parr on how Parr might overcome a plethora of tactical and strategic hurdles that would prevent him from making such a fantasy "statement" that "would change the attitude of the country." For example, Shultz questioned Parr if a van full of explosives would be enough or if he needed "a Ryder truck like McVeigh used"? Tr. Exh. 2A; 91. Similarly, in response to Schultz's allegation that driving a truck up to the building would look "awful suspicious," Parr opined that he could go to a store "and get me a set of Work n' Sport brown pants . . . [a]nd a brown button shirt . . . [and] get some sort of silly little, little ah name tag patch to make it look official." Tr. Exh. 2A; 91-92. Parr then agreed with Shultz's suggestion that the best "statement" would be to hurt the maximum number of federal agents

with the bomb, although he "hadn't quite figured out how." Tr. Exh. 2A; 102-03.

Having induced Parr to discuss some details of his fantasy "statement," Shultz pressed for a commitment to act. Shultz first tried to obtain a promise from Parr for exclusive interview rights after Parr did the deed, prompting Parr to laugh. Tr. Exh. 2A; 93-94. Parr then explained it would be a number of years before he would commit any act. Tr. Exh. 2A; 94. When Shultz asked "How long? How long do I gotta wait"? Parr responded, "Well, I'm 40 now. Maybe 50. Maybe it'll be my 50th birthday present." Tr. Exh. 2A; 94. Parr also expressed a desire to "pump out a few kids," first. Tr. Exh. 2A; 113. In an effort to get Parr to commit to a concrete date, Shultz pressed Parr four more times for an explicit commitment to follow through with the plan. Shultz first asked Parr if "there is a chance I won't have to wait 10 years"? Parr responded "Certainly is." Tr. Exh. 2A; 103. When asked, however, if there was a "[g]ood chance," Parr responded "I, I don't know. I, I'm not a gambler." Tr. Exh. 2A; 103. Later, Shultz pressed Parr a third time, stating:

> [Shultz]: So all this shit that you [sic.] been [sic.] tellin' me is not just all bullshit. Someday, someone's gonna get it I hope right?
>
> Parr: Absolutely.

[Shultz]: No doubt about it.

Parr. No doubt.

[Shultz]: Someone's gonna get it.

Parr: Someone's gonna get it.

App. 5a-6a.

Finally, upon Shultz confiding in Parr that "when my life becomes worthless . . . when I get cancer, when I get sick I wanna take somebody out," Parr agreed with the sentiment stating "there's gonna come a certain point in time where I just have nothing else and there's nothing else I wanna do . . . it's time to make my statement cause [sic.] I have nothing to lose." Tr. Exh. 2A; 112-13.

On September 21, 2004, Parr was released to a halfway house. App. 36a. The very next day, however, Parr was taken back into custody under the authority of his parole agent because of the concerns the FBI had about his conversation with Schultz. App. 36a. Parr was held in custody without a warrant for eight days and, on the eighth day, was finally interviewed by the FBI. App. 6a, 39a. Parr initially waived representation by counsel, and denied making any threatening statements against the Milwaukee federal building; asserting that it was Shultz who conceived of the plot. App. 6a. When confronted with the fact that the FBI had recorded his conversation with Shultz, however, Parr later

admitted to, "lawyering-up," i.e., refusing to say any more about the incident. App. 23a. Finding it significant that Parr declined to suggest his statements to Shultz were mere "jokes," on September 29, 2004, the day Parr was first interviewed, the FBI obtained an arrest warrant. Tr. 1; 107; App. 39a. The government then proceeded to charge and indict Parr under 18 U.S.C § 22321(a) for "threate[ning] . . . to use, a weapon of mass destruction . . . against any . . . property within the United States." App. 48a.

II. Proceedings Below

a. Pre-Trial Evidentiary Issues

The United States District Court for the Eastern District of Wisconsin had jurisdiction pursuant to 18 U.S.C. § 3231. In district court, Parr filed a motion to suppress the statements made to the FBI during his custodial interview and also to suppress anti-government writings and literature FBI agents recovered after searching Parr's prison possessions and, among other places, his last known residence. App. 35a. Following the denial of this motion, the government moved under Federal Rule of Evidence 404(b) ("Rule 404(b)") to introduce the testimony of several of Parr's former neighbors, girlfriends, co-workers and cellmates at trial to corroborate the government's claim that Parr held anti-government views and would likely someday act on his alleged fantasy. App. 47a, 67a-69a.

Additionally, the government moved to introduce the anti-government and bomb making literature recovered from its searches of Parr's personal effects and his personal diary. App. 75a-80a. Finally, the government sought to introduce testimony of an FBI explosives expert to explain that, with practice, Parr would someday be capable of building the bombs he spoke of with Shultz. App. 12a.

In weighing the merits of introducing this evidence, the district court stated the requirements of Rule 404(b) as follows:

> Evidence of other crimes, wrongs or acts is admissible under this rule, if it meets four requirements: "(1) it is directed toward establishing a matter other than the defendant's propensity to commit the crime, (2) the evidence was sufficient to support a jury finding that the defendant committed the similar act, (3) the other act is similar enough and close enough in time to be relevant to the matter at issue, and (4) the probative value is not substantially outweighed by the danger of unfair prejudice." *United States v. Coleman*, 179 F.3d 1056, 1061 (7th Cir. 1999).

App. 66a.

In reviewing the proffered Rule 404(b) evidence, the district court initially established that, under the statute and the Seventh Circuit's "true threat" jurisprudence, Parr's subjective intent was irrelevant to the factfinder's determination of whether the statements were "true threats." App. 65a, 69a. Nevertheless, based on its understanding of Rule 404(b), the district court ruled that testimony from Parr's former neighbors and girlfriends about his anti-government views and experiences building small scale bombs was at least "relevant" and therefore not unfairly prejudicial for the jury to consider when evaluating whether the prosecuted statements were themselves "true threats." App. 71a-76a. The district court accordingly permitted the testimony of the former girlfriends and neighbors, who later testified at trial about Parr's great interest in chemistry and bomb building, his sincere anti-government views and his admiration of Timothy McVeigh. App. 7a-8a, 71a-76a. The district court also permitted the testimony of the FBI explosives expert. App. 72a. It rejected the testimony of only those witnesses whose accounts were either cumulative in light of the evidence already admitted, or too remote to be reliable. App. 73a, 75a, 81a, 83a. Notably, the majority of the admitted witnesses' testimony would ultimately be in regard to facts, statements and acts unknowable to Shultz at the time he induced Parr to make the statements the government prosecuted.

b. Trial and Sentencing

At trial, the government presented the testimony of 12 witnesses, all of whom were either FBI agents or former associates of Parr's not present for the actual "true threat," the government prosecuted. App. 6a-7a, 71a-76a. Their testimony was proffered to establish Parr's statements about his alleged fantasy were "true threats" because: 1) Parr had access to explosives; 2) he often bragged about explosives; 3) some of this bragging may have been warranted; and 4) he maintained a genuine dislike of the federal government. App. 6a-8a. The defense called five witnesses, including Shultz. Tr. 2; 252. In addition to Shultz, the defense's witnesses were Parr's brother, a former FBI bomb blast expert, a psychiatrist and Parr himself. Tr. 3; 323, 388, 442, 472. The defense's witnesses testified that: 1) Parr suffered from a form of post-traumatic stress disorder and was being treated with mood stabilizers and anti-psychotics while in prison; 2) Parr was a braggart prone to exaggeration; and 3) Parr's knowledge of chemistry and bomb making was substantially exaggerated by Schultz and the government. Tr. 3; 323-27, 388-405, 442, 472. At the close of trial, the district court judge instructed the jury that, in order to find Parr's statements constituted a "true threat":

> you must find that the statement attributed to the defendant was made in a context or under such circumstances

> wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to use a weapon of mass destruction to damage Reuss Federal Plaza.

App. 98a.

Without elaboration, the district court also informed the jury that it must be satisfied "the defendant intended his statement to be understood in [a threatening] manner." App. 98a. The trial court further explained that a "true threat"

> is a serious statement expressing an intention to do an act which under the circumstances would cause apprehension is a reasonable person, as distinguished from idle or careless talk, exaggeration, or something said in a careless manner.

App. at 98a.

During deliberations, the jury requested the anti-government documents, pamphlets and the *Anarchist's Cookbook* recovered from Parr's residence. Tr. 4; 627. Parr's counsel objected, arguing that introducing this material into the deliberation was highly prejudicial and inflammatory. Tr. 4; 638-39. The district court

judge overruled the objection and the materials were provided to the jury. Tr. 4; 640-44. Shortly after receiving these documents, the jury returned with a guilty verdict. Tr. 4; 645.

Parr was subsequently sentenced to 120 months in prison with 60 months supervised release and a $2,000 fine. App. 8a. Although the pre-sentencing report and a number of sentencing enhancements (including an enhancement for crimes "involving a federal crime of terrorism" under U.S.S.G. § 3A1.4) recommended a guideline range of 360 months to life, the district court settled for 120 months because the crime did not fall in the "heartland" of the guidelines due to the fact that Parr's threat was not "imminent." App. 8a.

c. Appeal

Parr appealed under 18 U.S.C. § 1291, which granted the Seventh Circuit jurisdiction. On appeal, Parr argued that his conviction violated the First Amendment because the prosecuted statements were not "true threats," since the statements, taken in the context in which they were actually made, were neither threatening in fact nor expressions of "imminent" harm. App. 11a. Furthermore, Parr argued the district court erred in admitting the testimony of a majority of the 12 witnesses under Rule 404(b), since none of this testimony went towards proving or disproving either the objective or subjective "threatening" nature of the prosecuted

statements and only served to prejudice the jury. App. 11a.

The government cross-appealed, arguing that the district court's imposition of a 120 month sentence was unreasonably low. App. 26a. The basis for this cross-appeal was that the district court failed to properly justify its departure. App. 26a. Furthermore, the government argued, because the district court acknowledged Parr's conviction involved a "crime of terrorism" the downward departure was especially unwarranted. App. 2a, 26a.

In affirming Parr's conviction, the Seventh Circuit acknowledged a circuit split on the intent a speaker must have for a statement to constitute a "true threat." App. at 13a-16a. The panel also acknowledged that the district court's instruction to the jury that it must find Parr had a subjective intent to threaten was contrary to Seventh Circuit precedent, which required the alleged threat be evaluated from a strictly objective "reasonable speaker" or "reasonable listener" point of view. App. at 18a-19a. Nevertheless, the panel held that, in light of this Court's opinion in *Virginia v. Black*, 538 U.S. 343 (2003), an instruction on subjective intent to threaten, when coupled with the Seventh Circuit's requirement of an instruction on objective intent, was not constitutionally infirm. App. 16a. Finally, the court held that there was no unconstitutional prejudice in the government's use of witness

testimony unconnected to the content or context of the alleged "threat" because background information in the government's possession obtained via search warrants and interviews (but not in the recipient's possession at the time of the alleged "threat"), was relevant to the jury's determination of "true threats." App. 17a-18a. Although this evidence was introduced at trial under the guise of Rule 404(b), the Seventh Circuit affirmed its use under Federal Rule of Evidence 403 ("Rule 403"). App. 46a, 18a, 67a. The panel did concede, however, that the district court's decision to allow the jury to review the anti-government literature in the deliberation room was prejudicial, but ultimately concluded this error was harmless. App. 20a-21a. Finally, with regards to sentencing, the Seventh Circuit remanded, finding that the district court erred in calculating enhancements and that the court failed to provide the requisite "strong justification" for a 20 year departure for the sentencing guidelines. App. 26a-27a.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE INTER- AND INTRA-CIRCUIT SPLITS ON THE REQUISTE INTENT A SPEAKER MUST HAVE FOR HIS STATEMENTS TO CONSTITUTE "TRUE THREATS" UNPROTECTED BY THE FIRST AMENDMENT AND TO REJECT THE

VALIDITY OF THE SEVENTH CIRCUIT'S BROAD FORMULATION OF THE "TRUE THREAT" DOCTRINE AND ITS UNCONSTIUTIONAL EVIDENTIARY STANDARD

Prohibitions against the content of pure speech are presumptively invalid under the First Amendment unless drafted in a way that, while protecting a compelling state interest, also limit likely and foreseeable restrictions on protected speech. *See e.g. R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-83 (1992). This immutable premise has been the guiding light of this Court's First Amendment jurisprudence and the litmus test for evaluating the constitutionality of countless state and federal restrictions on speech. *See e.g. Chaplinsky v. N.H.*, 315 U.S. 568, 571-72 (1942); *Carroll v. Princess Anne*, 393 U.S. 175, 183-184 (1968); *N. A. A. C. P. v. Claiborne Hardware Co.*, 458 U.S. 886, 912 (1982); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244 (2002). Yet, despite the mandate of this fundamental principle of the First Amendment, since this Court first established the doctrine of "true threats" in *Watts v. United States*, 394 U.S. 705 (1969), for nearly 40 years, it has by and large left lower courts to sort out a broad and unclear constitutional standard imposing criminal liability on the content of pure speech. *See e.g. U.S. v. Parr*, 545 F.3d 491, 500 (7th Cir. 2008) (describing this Court's most recent formulation of the "true

threat" doctrine in *Virginia v. Black*, 538 U.S. 343 (2003), as "unclear"); *Planned Parenthood of the Columbia Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058, 1071 (9th Cir. 2002) (noting that, with respect to the definition of "true threats," "[t]he Supreme Court has provided benchmarks, but no definitions"); Paul T. Crane, *"True Threats" and the Issue of Intent*, 92 VA L. REV. 1225, 1252 (2006) ("the lack of clear guidance from the Supreme Court on this subject has fostered the proliferation of eclectic and contradictory standards.").

As most recently articulated by this Court in *Virginia v. Black*, "true threats," proscribable under the First Amendment "encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." 538 U.S. at 359 (internal citations omitted). Notwithstanding this definition, the circuit courts remain bitterly and irreversibly divided on whether the government must prove a purely objective "reasonable listener" or "reasonable speaker" would find a statement truly threatening, or whether the government must show a speaker had a "subjective intent to threaten," before the statement constitutes a "true threat." *Compare U.S. v. Fuller*, 387 F.3d 643, 646 (7th Cir. 2004) ("a communication is a 'true threat' if a reasonable person would foresee that the statement would be interpreted by those to whom the maker

communicates the statement as a serious expression of an intention to inflict bodily harm") (internal quotation omitted), *with U.S. v. Cassel*, 408 F.3d 622, 633 (9th Cir. 2005) (holding that, in light of this Court's *Black* opinion, "[w]e are [] bound to conclude that speech may be deemed unprotected by the First Amendment as a 'true threat' *only* upon proof that the speaker *subjectively* intended the speech as a threat.") (emphasis added) (citing *Black*, 538 U.S. at 360). Depending on the standard applied, these two approaches lead to dramatically different outcomes and different restrictions on the content of pure speech within and across the circuit courts.

In holding that the fantastical statements teased out of Parr by his cellmate constituted a "serious expression of an intent to commit an act of unlawful violence," *Black*, 538 U.S. at 359, the Seventh Circuit panel below took neither approach, however. Instead, the panel broke with its own precedent (and that of a majority of circuits) to fashion a new hybrid subjective/objective standard for "true threats." *See Parr*, 545 F.3d at 500. Not only did the Seventh Circuit contribute a fresh division to the inter- and intra-circuit splits with its "split the baby" approach to "true threats," it also endorsed an evidentiary standard that is unconstitutional when applied to restrictions on pure speech—a standard permitting the government to establish the purported threatening nature of the prosecuted speech primarily by reference to the prior

acts and statements known to the *government* through warrants and subpoenas but not the recipient of the alleged threat. *Id.* at 498-99.

The Seventh Circuit's broad definition of "true threats," is in direct conflict with its sister circuits, and the new three way inter- and intra-circuit split leaves the lower courts with an ambiguous "true threat" doctrine at war with the fundamental principles of the First Amendment. Moreover, not only is the Seventh Circuit's new evidentiary standard, as applied to its broad definition of "true threats," in conflict with the objective and subjective approaches it purports to advance, it also violates the principle of the First Amendment that an evidentiary standard must protect against convictions based solely on "speech [that] stirred people to anger, invited public dispute, or brought about a condition of unrest." *Terminiello v. City of Chicago*, 337 U.S. 1, 5 (1949).

a. This Court's Definition of "True Threats" Is Open To Multiple Competing Interpretations And The Numerous Inter- And Intra Circuit Splits Demonstrate The Lower Courts Are Intractably Divided On The Correct Constitutional Standard, Leading to an Unconstitutionally Broad "True Threat" Doctrine.

This Court has clearly established that, although the government may not proscribe categories of expressive speech because of a disapproval of the ideas expressed therein, *see R.A.V.*, 505 U.S. at 382, it may, in certain "well defined and narrowly limited" circumstances, place restrictions on the content of pure speech where the underlying message or conduct expressed will cause a clearly articulated and imminent harm. *Chaplinsky*, 315 U.S. at 571-72; *c.f.also Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (a state may not "forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."); *Ashcroft*, 535 U.S. at 253 ("The government may not prohibit speech because it increases the chance an unlawful act will be committed 'at some indefinite future time.'") (quoting *Hess v. Indiana*, 414 U.S. 105, 108 (1973) (*per curium*)). Furthermore, not only must the harm be clear, imminent and narrowly defined,

but the benefit to society of restricting the speech must substantially outweigh the violence done to the principles of the First Amendment by such content based restrictions. *See Chaplinsky*, 315 U.S. at 571-72.

This Court has thus far failed to provide lower courts with such a coherent and narrowly defined standard for its self-created doctrine of "true threats"; a doctrine utilized by the circuit courts to impose penal restrictions on the content of pure speech through constitutionally based statutory interpretation. *See e.g. U.S. v. Hanna*, 293 F.3d 1080, 1087 (9th Cir. 2002). Indeed, as evidenced by the competing definitions of "true threats" both within and across the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits, the "true threat" doctrine is being interpreted in myriad open-ended and conflicting ways. *Compare Fuller*, 387 F.3d at 646 (collecting "objective intent to threaten" approaches to "true threats" across the circuits), *with U.S. v. Magleby*, 420 F.3d 1136, 1139 (10th Cir. 2005) (endorsing a "subjective intent to threaten" standard for "true threats"), *and Fogel v. Collins*, 531 F.3d 824, 831 (9th Cir. 2008) (outlining Ninth Circuit internal split on the intent requirement for "true threats").

i. This Court's Formulation of the "True Threat" Doctrine Is Open to

Multiple Irreconcilable Interpretations.

This Court has only fleetingly addressed what speech constitutes "true threats." In the first case to address the question, this Court held in *Watts v. United States*, that a statute prohibiting a person from "knowingly and willfully . . . [making] any threat to take the life of or to inflict bodily harm upon the President of the United States," could not be constitutionally applied to the statement of a Vietnam War protester who asserted at a public anti-war rally that "[i]f they ever make me carry a rifle the first man I want in my sights is L.B.J." 394 U.S. at 706, 708. In overruling a jury and a D.C. Circuit panel that found these statements constituted "true threats," this Court simply disagreed, instead characterizing the statements as "political hyperbole." *Id.* at 708. Because of the Constitution's "commitment to the principle that debate on public issues should be uninhibited, robust and wide-open," and this Court's recognition that such debate might include "vehement caustic, and sometimes unpleasantly sharp attacks on government and public officials," the *Watts* Court held that the context of the defendant's statements made the jury's threat determination unconstitutional. *Id.* (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). This Court, however, failed to establish a clear standard for what would constitute a "true threat," under different circumstances.

Subsequently, in the only other majority opinion to address the issue since *Watts*, this Court briefly articulated a definition of "true threats" in *Virginia v. Black*. 538 U.S. at 359-60. In *Black*, this Court addressed the question of whether a state statute making it a felony "for any person . . . with the intent of intimidating any person or group . . ., to burn . . . a cross on the property of another, a highway or other public place," was unconstitutional in light of a provision of the same statute that made "any such burning . . . prima facie evidence of an intent to intimidate a person or group." *See Id.* at 348. While the *Black* Court was principally concerned with the question of whether the statute was an unconstitutional form of viewpoint or content discrimination, in holding the statute unconstitutional, the Court explained that "true threats," "encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." 538 U.S. at 359. The Court further elaborated its "true threat" definition by noting that, "intimidation in the constitutionally proscribable sense of the word is a type of true threat, where the speaker directs a threat to a person or group of persons with the *intent* of placing the victim in fear of bodily harm or death." *Id.* at 360 (emphasis added). Only a plurality, however, went on to assert that, because a cross might be burned for purposes other than intimidation (resulting in speech protected by the

First Amendment), the trial court's instruction on the prima facie evidence provision rendered the threat determination unconstitutional. *Id.* at 364.

ii. The Lower Courts Are Deeply And Irreversibly Divided on the Question of the Intent a Speaker Must Have For a Statement to Become a "True Threat"

Prior to *Black*, seven circuits, including the Seventh, adopted a "reasonable speaker" test for "true threats," requiring the government to prove the speaker made the prosecuted statement "under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm." *U.S. v. Roy*, 416 F.2d 847, 877 (1969); *see also* Crane, 92 VA L. REV. at 1244-45 (compiling pre-*Black* circuit approaches). Essentially a "negligence" test for speech, *see e.g. id.* at 1241 (citing *Rogers v. U.S.*, 422 U.S. 35, 47-48 (1975) (Marshall, J., concurring)), many circuits anchored this objective standard in the First Amendment, holding it was constitutionally mandated. *See e.g. U.S. v. Merrill*, 746 F.2d 458, 462 (9th Cir. 1984). Rifts among and within the circuits began to emerge, however, as panels from five circuits, interpreting various statutes, adopted a "reasonable listener" test

for "true threats," requiring the government to prove "any ordinary reasonable recipient [of the statement] who is familiar with the context of the [statement] would interpret it as a threat of injury." *U.S. v. Maisonet*, 484 F.2d 1356, 1358 (4th Cir. 1973); *see also* Crane, 92 VA L. REV. at 1246-47 (compiling "reasonable listener" approaches). Meanwhile, the Fifth Circuit adopted a "neutral reasonable person" test, defining a "true threat" as a statement that "in its context would have a reasonable tendency to create apprehension that its originator will act according to its tenor." *See e.g. U.S. v. Bozeman*, 495 F.2d 508, 510 (5th Cir. 1997) (internal quotations omitted).

To further confuse matters, in *Rogers v. United States,* Justice Marshall brought to the fore a subjective standard for "true threats" in a concurring opinion. 422 U.S. at 48 (Marshall, J., concurring). In *Rogers*, this Court granted certiorari in order to address the emerging circuit divide on the correct intent standard for "true threats," under 18 U.S.C. § 871(a), the statute criminalizing threats made against the President of the United States. *See id.* at 36. Ultimately, however, the *Rogers* court declined to address the question certiorari was granted for, instead opting to reverse on procedural error grounds. *See id.* at 42 (Marshall, J., concurring). In a concurring opinion, however, Justice Marshall did address the intent question, proposing that "true threats" only encompassed those statements "the

speaker *intends* to be interpreted as expressions of an intent to kill or injure." *Id.* at 47 (emphasis added). Thus, under this "specific intent to threaten" version of "true threats," the speaker must have intended for the statement to cause the recipient to fear imminent injury to himself or to some third person, *see e.g. U.S. v. Patillo*, 438 F.2d 13, 15 (4th Cir. 1971) (holding that "true threats" may be communicated to third parties), at the time the prosecuted statement was made.

Although Justice Marshall's proposed "specific intent to threaten" test failed to meaningfully impact the predominantly objective approaches to "true threats" in the circuit courts, this Court's reference to a subjective intent requirement for "true threats" in *Black* caused total chaos to erupt. *See e.g.* Crane, 92 VA L. REV. at 1261-1269.

For starters, in the first post-*Black* "true threat" case in the Seventh Circuit, a panel maintained the validity of the "reasonable speaker" approach, without a single citation to *Black* and its subjective intent definition of "true threats." *See Fuller*, 387 F.3d 643. This "head in the sand" approach was initially popular in the First, Fourth, Fifth, Eighth and Eleventh Circuits. *See U.S. v. Nishnianidze*, 342 F.3d 6, 15-17 (1st Cir. 2003); *U.S. v. Lockhart*, 382 F.3d 447, 451-52 (4th Cir. 2004); *U.S. v. Reynolds*, 381 F.3d 404, 406 (5th Cir. 2004);

U.S. v. Koski, 424 F.3d 812 (8th Cir. 2005); *U.S. v. Alaboud*, 347 F.3d 1293, 1297-98 (11th Cir. 2003).

Recently, however, many circuit courts began to acknowledge but dodge the import of a potential subjective approach to "true threats," articulated in *Black*. Thus, in *United States v. Cope*, the Sixth Circuit refused to decide if *Black* required a wholesale revision of the Sixth Circuit's objective "true threat" standard on plain error review of a jury instruction where the panel ultimately agreed with the outcome. 283 Fed.Appx. 384, 389 (6th Cir. 2008) (unpublished opinion). Similarly, in *United States v. Floyd*, an Eight Circuit panel implied it was powerless to address the import of *Black*. 458 F.3d 844, 848 (8th Cir. 2006) ("[O]ur panel is bound by *Koski*, decided two years after *Black*, which specifically noted that the intent of the sender is not an element of a section 876(c) offense. If the reasoning in *Koski* is faulty in light of *Black*, our panel cannot address it—only the *en banc* court can do so.").

Meanwhile, in *United States v. Magleby*, the Tenth Circuit held *Black* mandated a departure from its "reasonable speaker" test in favor of a subjective standard where, in order to qualify as a "true threat," a statement must be made "'with the intent of placing the victim in fear of bodily harm or death.'" 420 F.3d at 1139 (quoting *Black*, 538 U.S. at 360). *See also Parr*, 545 F.3d. at 499 (describing *Magleby*

as a "subjective" approach); Crane, 92 VA L. REV. at 1227 (same). Thus, the Tenth Circuit found great significance in this Court's use of an explicit subjective intent to threaten requirement for "intimidating true threats" and, accordingly, applied this requirement to all "true threats." Recently, however, without citation to *Black* or *Magleby*, a different Tenth Circuit panel announced in *United States v. Pinson* that "[o]ur Court, like most others, employs an objective standard [for 'true threats'] to evaluate [only] whether a defendant 'willfully' made a threat," thus setting up an intra-circuit split on intent. 542 F.3d 822, 831-32 (10th Cir. 2008).

For its part, the first panel to address the intent question post-*Black* in the Ninth Circuit took the same approach as the Seventh, First, Fourth and Eleventh Circuits by simply ignoring *Black* while maintaining the "reasonable speaker" test was the law of the land. *See U.S. v. Lincoln*, 403 F.3d 703, 706 (9th Cir. 2005). Within two months, however, a different panel arrived at the same conclusion as the Tenth Circuit in *Magleby*, asserting that *Black* overruled the Ninth Circuit's "reasonable speaker" test because the Supreme Court's "definition of a constitutionally proscribable threat is, of course, binding on us even though it is in tension with some of the holdings and language in prior cases of this circuit." *Cassel*, 408 F.3d at 633. Once again, however, in less than two months time a third Ninth Circuit panel held that the *Cassel* panel was

mistaken about the scope of *Black* and that "*Cassel* does not alter the analysis of presidential threats, [where] we employ the decades-old approach to analyzing threats [utilizing the 'reasonable speaker' test]." *U.S. v. Romo*, 413 F.3d 1044, 1051 n.6 (9th Cir. 2005). Evidently reaching an insurmountable impasse on the constitutional definition of "true threats," the Ninth Circuit now analyzes "true threats" under both intent standards, either hoping they will not conflict or justifying the ultimate conclusion on the alleged threat *ex post*. Thus, in *United States v. Stewart*, a Ninth Circuit panel held it need not resolve the intra-circuit split on the correct intent standard where both tests failed to provide First Amendment protection for the prosecuted speech. 420 F.3d 1007, 1018 (9th Cir. 2005). Most recently in *Fogel v. Collins*, another panel once again determined that it need not adopt a uniform intent test where both tests resulted in the prosecuted speech falling under the protection of the First Amendment. 531 F.3d at 831. *See also U.S. v. Sutcliffe*, 505 F.3d 944, 961-62 (9th Cir. 2007) ("Defendant argues that the jury was erroneously instructed to apply an objective, rather than subjective, test to determine whether his statements constituted true threats. Given our contradictory case law on this issue, it is not clear that the instruction was actually erroneous."). Indeed, the District Court for the Northern District of New Jersey recently highlighted the absurdity of the Ninth Circuit approach, observing that "[t]he Third

Circuit does not share the Ninth Circuit's apparent inability to determine what comprises a 'true threat.'" *U.S. v. D'Amario*, 461 F.Supp.2d 298, 302 (D.N.J. 2006).

The divide on the requisite intent for "true threats" reached its apex in the Seventh Circuit's *Parr* decision below. Rather than hold the district court's hybrid objective/subjective jury instruction either flatly violated the purportedly constitutionally mandated Seventh Circuit objective standard, or hold that it was plainly erroneous and must be overruled in light of the subjective intent standard other panels found mandated by this Court in *Black*, the Seventh Circuit panel simply hedged. *Parr*, 545 F.3d at 500. Thus, according to the panel:

> a standard that combines objective and subjective inquiries might satisfy the constitutional concern: the factfinder might be asked first to determine whether a reasonable person, under the circumstances, would interpret the speakers statement as a threat, and second, whether the speaker intended it as a threat.

Id.

In short, *Black* failed to move the circuit courts towards a uniform "true threat" standard. Indeed, if this Court achieved anything with its

definition of "true threats" in *Black*, it was to deepen the circuit divide and increase the opportunity for inconsistent approaches. Because these divergent standards fail to comprise a "narrowly drawn and limited," body of First Amendment law, *Chaplinsky*, 315 U.S. at 573, and because, contrary to the Ninth and Seventh Circuits' current approach, there is great potential for divergent outcomes under the two standards, this Court must grant certiorari.

iii. The Conflicting Intent Standards in the Circuit Courts Lead to Divergent Outcomes.

The conflict in the lower courts over intent is meaningful, and the diverging approaches lead to dramatically different outcomes and available defenses when applied to the content of similar or identical speech. *See e.g.* Crane, 92 VA L. REV. at 1236. More importantly, however, as the Seventh Circuit's *Parr* decision illustrates, there are at least two ways of establishing a "subjective intent to threaten" that result in dramatically different doctrines and outcomes.

With regards to prosecution of "true threats" under the objective standard, as Justice Marshall noted in *Rogers*, the objective "negligence" standard subjects the defendant to prosecution "for any statement that might reasonably be interpreted as a threat, regardless of the speaker's intention."

Rogers, 422 U.S. at 47 (Marshall, J., concurring). Thus, the only requirement for prosecution under the objective standard is that the statement "was not the result of mistake, duress or coercion." *See e.g. U.S. v. Hart*, 457 F.2d 1087, 1091 (10th Cir. 1972). On its face, then, this test precludes a defendant from successfully asserting he intended the statement as a crude joke, an expression of fantasy or "political hyperbole" if a reasonable speaker (as determined by a factfinder) doesn't "get" the joke or fails to perceive the hyperbole. *See e.g. Lockhart*, 382 F.3d at 452. The objective standard also eliminates the diminished capacity defense. *See e.g. U.S. v. Myers*, 104 F.3d 76, 80-81 (5th Cir. 1997) (holding that an individual suffering from post traumatic stress disorder was capable of making "true threats"); *U.S. v. Richards*, 415 F.Supp.2d 547, 551 (E.D. Pa. 2005) ("defendant's "evident . . . mental health problems . . . do not prevent his threats from being true threats.").

Under the subjective test, by contrast, the government must prove both that the statement was "voluntary" (as in the case of the objective tests) and that the defendant "*intended* to make a threatening statement, and that the statement he made was in fact threatening in nature." *Rogers*, 422 U.S. at 47 (emphasis added). Accordingly, the defendant is free to assert diminished capacity, if it prevents him from having formed the requisite intent. *See e.g. U.S. v. Twine*, 853 F.2d 676, 679-80 (9th Cir. 1988) (holding

that diminished capacity defense is available for certain statutorily defined "specific intent" "true threat" crimes). Additionally, the factfinder must weigh the relevant evidence surrounding the statements to determine whether the context suggests the speaker actually meant to place his audience "in fear of bodily harm or death." *C.f. Magleby*, 420 F.3d at 1139.

Despite the requirement of subjective intent, on its face, the subjective test fails to provide any guidance on how the government may establish defendant's the intent. Two standards with dramatically different consequences are possible. First, the government might be limited to presenting evidence of what the speaker and the recipient of the threat knew or reasonably could know about each other at the time of the alleged threat. *C.f. Koski*, 424 F.3d at 822-23 (Bye, J., dissenting) (arguing for an evidentiary standard limited to the speaker's and the recipient's relationship). This approach limits the admissible evidence on subjective intent to all the relevant interactions between the speaker and the recipient at the time of the alleged threat and excludes statements, conduct and evidence unknown or unknowable to the recipient. *C.f. U.S. v. Khorrami*, 895 F.2d 1186, 1192 (7th Cir. 1990) (applying the objective "reasonable listener" test and limiting admissible evidence to statements a recipient "familiar with the context of the communication" could evaluate).

A second approach, adopted by the Seventh Circuit in *Parr*, is allowing the factfinder to evaluate evidence unconnected to the prosecuted statements of prior actions or statements made by the defendant tending to show an omnipotent listener who knows everything there is to know about this defendant *should* construe the prosecuted statements as threats, even if it would be unreasonable for the recipient to do so. *Parr*, 545 F.3d at 501. Under this approach, prior statements, beliefs and actions unknown or unknowable to the recipient are permitted to influence the factfinder's determination of subjective intent. *Id.* Thus, according the Seventh Circuit, a factfinder's "true threat" determination

> is informed by but not limited to what the recipient or target of the alleged threat knew about the defendant. Contextual information—especially aspects of the defendant's background that have a bearing on whether his statements might reasonably be interpreted as a threat—is relevant and potentially admissible *regardless* of whether the recipient or targeted victim had full access to that information.

Id. at 502 (emphasis added). This approach is the crux of the constitutional infirmity of the Seventh Circuits hybrid subjective/objective approach.

b. The Evidentiary Standard For Establishing A "Subjective Intent To Threaten" Adopted By The Seventh Circuit Is Incorrect And Violates The First Amendment.

In affirming Parr's conviction, the Seventh Circuit found it significant that, at oral argument, Parr did not commit to facially challenging the jury instruction on the intent required for his statements to constitute a "true threat." *Parr*, 545 F.3d at 497. Moreover, the court noted, Parr's First Amendment challenge to the government's use of prior statements and anti-government literature as evidence to prove his purported subjective intent failed to constitute such a meaningful challenge because the trial court reasonably relied on the Federal Rules of Evidence. *Id.* at 501.

Put bluntly, The Seventh Circuit mischaracterized the basis of Parr's challenge and, while doing so, gave its blessing to an evidentiary standard that begs this Court's attention. The basis of Parr's challenge below was that he was entitled to a trial and jury instruction on whether his statements, based solely on the *content* and especially the *context* in which they were made, constituted "true threats," not simply whether a fleeting generalized instruction on present subjective intent sufficed in light of the evidence presented by the government. The distinction is a meaningful one, and one this Court's must resolve in the context

of the "subjective intent to threaten" approach to "true threats" currently applied (in some form) by the Seventh, Ninth and Tenth Circuits. *See supra* at 28-31. Regardless, as this Court noted in *Terminiello*, a petitioner's failure to object to a jury instruction is immaterial to this Court's consideration of a case where the instruction was unconstitutional. 337 U.S. at 5.

In *Black*, a plurality of this Court held that evidentiary standards applied to penal restrictions on the content of pure speech are unconstitutional where they are likely to "'skew jury deliberations toward conviction in cases where the evidence of intent to intimidate is relatively weak.'" *Black*, 538 U.S. at 366 (quoting *Black*, 538 U.S at 385 (Souter, J., concurring in judgment and dissenting in part)). Moreover, it has long been acknowledged by this Court that juries are particularly unreliable vehicles for evaluating restrictions on pure speech when the underlying facts "allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression." *Hustler Magazine v. Falwell*, 485 U.S. 46, 55 (1988). Thus, convictions obtained primarily based on evidence of speech that "stirred people to anger, invited public dispute, or brought about a condition of unrest . . . may not stand." *Terminiello*, 337 U.S. at 5; *c.f. also Old Chief v. U.S.*, 519 U.S. 172, 180 (1997) (holding that "relevant" evidence is not admissible under Rule 403's "unfair prejudice" rule

where the relevant evidence only serves "to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged.")

As noted *supra*, the Seventh Circuit's evidentiary standard, for "true threats" in light of Rule 403 provides that, "[c]ontextual information—especially aspects of a defendant's background that have a bearing on whether his statements might reasonably be interpreted as a threat—is relevant and potentially admissible regardless of whether the recipient or targeted victim had full access to that information." *Parr*, 545 F.3d at 501. According to the Seventh Circuit, this interpretation of Rule 403 as applied to speech crimes strikes the right balance because "when a person says he plans to blow up a building, he will naturally be taken more seriously if he has a history of building bombs and supporting terrorism." *Id.* at 501.

The difficulty with the Seventh Circuit's new evidentiary standard is that it fails to acknowledge the critical distinction between highly prejudicial evidence of the probability of committing an *act* completely unconnected to the prosecuted statements, and evidence that proves an intent the prosecuted statements were meant to *threaten*. In any "true threat" case that applies the "subjective intent to threaten" approach there will always be potential evidence of both an intent to cause the recipient of the speech to fear some imminent harm,

either to himself or some third party, public building or official, *c.f. Patillo*, 438 F.2d at 15 (holding that threats against the president may be communicated to third parties because "[a] threat against the President may [itself] cause substantial harm . . . A President . . . has a personal interest in his own security, as does everyone."); *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 616 (5th Cir. 2004) (noting that "true threats" may be communicated to third persons), as well as evidence connected or unconnected to the statements that the speaker actually intended to act in a certain way. Thus, in any given "true threat" case there are four possible intent scenarios. First, a speaker may have no intent to act and no intent for his speech to be threatening. Second, the speaker may have a private unexpressed desire to act, but no present intention for his otherwise innocuous statements to be threatening or to cause fear or disruption. Third, there may be an intent to threaten, but no actual intent to act on the threat. Finally, there may be an intent to act and an intent to threaten.

The "true threat" doctrine articulated by this Court in *Black* clearly covers the last two scenarios. *See* 538 U.S. at 359-60. Under the wide net cast by the Seventh Circuit's Rule 403 subjective intent evidentiary standard, however, convictions for "true threats" are also possible—indeed probable—under the first two scenarios. Under this standard, even if a reasonable speaker or listener (as determined by a

factfinder) would never find the prosecuted statements, standing alone in their proper context, to be "truly threatening," a factfinder might nevertheless compelled to find that the same statements spoken by *this particular defendant*, become "true threats" because of what the government, through warrants and subpoenas, has *subsequently* learned about the speaker's past statements and associations, as opposed to what the listener knows or can know.

That Parr was convicted for making non-imminent, qualified and hypothetical statements to his cellmate about a desire of someday expressing his anger towards the government with violence illustrates the danger of this approach. The bulk of the evidence admitted by the district court at Parr's trial went towards establishing a probability of *acting*, and not towards Parr's subjective intent of placing Shultz in fear of some *imminent* harm to himself or to a third party. At trial, the government presented the testimony of 12 witnesses who testified about Parr's anti-government views, his admiration of Timothy McVeigh and his affinity for explosives. App. 7a; 67a-72a. The Government also presented the testimony of an FBI explosives expert who claimed Parr would someday be able to build a big enough bomb "with practice." App 12a, 72a. Finally, in the deliberation room the jury reviewed, in their entirety, Parr's anti-government pamphlets and bombmaking handbooks. App. 21a, 80a; Tr 4; 640-41.

Absolutely *none* of this evidence did or could have established Parr's present "*intent* of placing [the recipient of the threat] in fear of bodily harm or death," or fear of harm to a third party. *Black*, 538 U.S at 360. Indeed, scant attention was paid to the content and context of the actual *qualified* statements that were prosecuted, where Parr only discussed the plan after taking his prescription mood-stabilization medication and after excessive pestering from Shultz. Tr. Exh. 2A; 53-54, 98-113. To the contrary, the jury was instructed to consider "*all* the evidence in the case, including the circumstantial evidence," to determine if Parr's possible past and future intentions conclusively proved his present intent. App. 93a, 98a (emphasis added).

If all this evidence, entirely unrelated to Parr's subjective intent to communicate a present *threat* to Shultz, did not "'skew jury deliberations toward conviction," *Black*, 538 U.S. at 366, it is difficult to imagine what would. If anything, evidence admitted under Rule 404(b) (affirmed by the Seventh Circuit under Rule 403, App. at 18a, 67a), of the hypothetical threat Parr might someday pose if released from prison forced the jury to ignore the contextual circumstances necessary for determining whether the statements were made with an actual subjective intent to *threaten*. As a plurality of this Court noted in *Black*, however, "[t]he First

Amendment does not permit such a shortcut." *Id.* at 367.

CONCLUSION

For the reasons stated, the Court should grant the petition for certiorari.

Respectfully submitted,

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DECEMBER 9, 2008

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United States Court of Appeals, Seventh Circuit.

UNITED STATES of America,

Plaintiff-Appellee, Cross-Appellant,

v.

Steven J. PARR,

Defendant-Appellant, Cross-Appellee.

Nos. 06-3300, 06-3457.

Argued Sept. 7, 2007.

Decided Sept. 18, 2008.

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Before BAUER, POSNER, and SYKES, Circuit Judges.

SYKES, Circuit Judge.

Steven Parr was convicted of threatening to use a weapon of mass destruction against a federal government building and was sentenced to 10 years in prison. *See*18 U.S.C. § 2332a(a)(3) & (a). On appeal, Parr argues that he was convicted for

conduct protected by the First Amendment and that the district court abused its discretion in allowing the jury to hear evidence of his extensive background relating to bomb-making and his fascination with domestic terrorism.

On those issues, we affirm. The First Amendment allows restrictions on speech containing threats, and the jury was entitled to find that Parr's statements about bombing the federal building in Milwaukee qualified as "true threats." As for the evidence regarding Parr's background, it was highly relevant to the jury's "true threat" determination. One item of evidence, however-*The Anarchist Cookbook*-should not have gone to the jury in its entirety. This manual of the 1970s antiwar subculture contains recipes for making homemade explosives and weaponry. It was found in Parr's possession and parts of it were relevant and admissible, but it was a mistake to submit the entire book to the jury during deliberations. The error, however, was harmless.

Parr also raises a number of other challenges-both to his conviction and his sentence-but only one has merit. In calculating Parr's advisory sentencing range under the Sentencing Guidelines, the district court concluded that Parr's crime "involved" a "federal crime of terrorism" and therefore applied a 12-level enhancement under U.S.S.G. § 3A1.4. We conclude that the threat itself did not "involve" a crime of terrorism as that term is understood under the guideline, but Parr's crime might still qualify for the enhancement if the district court finds that a purpose of the threat was to "promote" a crime of terrorism. We therefore remand for resentencing.

In light of the remand, we need not decide the issue raised in the government's cross-appeal: whether the 10-year sentence, well below the guidelines range of 360 months to life, is unreasonable. No doubt the sentence was lenient relative to the range, but we withhold judgment on whether this degree of leniency was adequately justified. The range, and the sentence imposed, may be different on remand.

I. Background

In the summer of 2004, the FBI received a letter warning that "somebody is making plans to blow up the federal building" in Milwaukee. The letter writer, John Schultz, was an inmate in Wisconsin's prison system, and the "somebody" was his cellmate, Steven Parr. Schultz told the FBI that Parr had repeatedly threatened to blow up the Reuss Federal Plaza in Milwaukee and that these comments should be taken seriously because Parr knew a lot about bombmaking chemistry, was a follower of the domestic terrorist Timothy McVeigh, and would complete his prison term (for marijuana distribution) in less than a month. After briefly investigating, the FBI learned that Parr had previously been found in possession of bombmaking instructions and that one of his prison notebooks contained an antigovernment statement. Agents convinced Schultz to wear a wire to record Parr's statements.

The night before Parr was to be released Schultz recorded a lengthy conversation between the two that would become the cornerstone of this prosecution. At first, the conversation centered on

bombmaking techniques. Parr explained to Schultz how to build various types of bombs, discussed where to purchase particular chemicals useful for creating explosives, and shared his past experiences with manufacturing and detonating homemade explosives. The details were grisly. To take just one example, Parr described a bomb he had designed to be hidden in a Noxzema face-cream container and said he planned to use this device against an ex-girlfriend with the aim of disfiguring her. Parr said he had completed construction of this bomb but chickened out and never used it. At another point in the conversation, Parr confessed to burning down a different ex-girlfriend's house using napalm, a crime for which he had never been charged and for which the statute of limitations had expired.

It was against this background of disclosures that Parr described his plan to blow up the Reuss Federal Plaza in Milwaukee. He said he planned to construct a bomb inside a delivery truck, park the truck outside the federal building, and walk inside as if to make a delivery. He explained that he would briefly enter the building but then would slip outside immediately and run as far as he could before the bomb exploded.

The plan was detailed. Parr mentioned the number of detonators and drums of explosives he would use, where he would park, and how he would deflect suspicion. Some of the plan was described conditionally-he said, for example, that he would have to find a schedule of conventions or employee meetings at the Reuss Plaza so he could explode the bomb at a time when a lot of federal employees were in the building (ATF agents were of particular

interest). But much of the plan was described in definite terms: "Oh, it will be extremely loud. Echoing off the buildings and ... [the federal building], it's all glass. The damage that will be done will just be complete."

Parr explained that he wanted to be "the next McVeigh" and that he had chosen the federal building in Milwaukee as his target because it was in "down home America" and would "make a wonderful statement." He said that antigovernment "militia groups" would be inspired by his bombing, just as they were when McVeigh blew up the federal building in Oklahoma City. He said: "I may not be as radical as [McVeigh], but I surely agree with him and it might unite more people. It might generate some people to stand up and say, you know what? Enough is enough." Parr promised to give Schultz an interview afterward so he could sell his story as Parr's former cellmate to the *National Enquirer* and other publications.

Parr did not specify an exact time frame for his plan, noting that he would be on probation for eight years after his release and would use that time to "refine [his] techniques" because he would get only one chance. But he vowed to pull off his plan within ten years: "Well, I'm 40 now. Maybe 50. Maybe it'll be my 50th birthday present." Despite some of his more conditional statements and the uncertainty about the timing, Parr emphasized that he "absolutely" would execute his plan:

> Schultz: So all this shit that you been tellin' me is not just all bullshit. Someday, someone's gonna get it I hope

right?

Parr: Absolutely.

Schultz: No doubt about it.

Parr: No doubt.

Schultz: Someone's gonna get it.

Parr: Someone's gonna get it.

The conversation concluded with the two men discussing Schultz's status as an accomplice by virtue of the knowledge he now had of the "inside details" of Parr's plans. Parr also mentioned that he had committed "several federal felonies" just by telling Schultz how to make a bomb, adding that "in today's terrorist environment," it's "a very serious crime" to "explain to someone how to make a bomb."

The day after this conversation, Parr was released to a halfway house but was quickly rearrested and indicted for threatening to use a weapon of mass destruction against a federal government building in violation of 18 U.S.C. § 2332a(a)(3). After his arrest Parr voluntarily spoke to FBI agents and denied having made the statements. Given the existence of the recording, that wasn't a tenable position. At trial prosecutors played the recording of Parr's remarks and called Schultz to testify about his conversations with Parr. Parr testified and admitted making the statements (he could hardly do otherwise) but claimed he had been joking-just mouthing off to his cellmate.

Prosecutors painted a different picture.

Schultz testified that he had taken Parr's comments seriously. A number of witnesses-including three of Parr's ex-girlfriends and two former neighbors-testified that Parr had long hated the government, experimented with explosives, and admired domestic terrorists. One ex-girlfriend testified that Parr owned chemistry equipment and liked to experiment with chemicals and explosives. She said he liked to read books on bombmaking and ordered kegs containing black powder. More troubling, she testified that he frequently spoke of Timothy McVeigh and that he was "fascinated" with and upset by McVeigh's execution. She also mentioned that he had spoken of blowing up buildings-remarks she believed were serious-and that he went by the nickname "Uni," apparently a reference to Ted Kaczynski (the "Unabomber"), another domestic terrorist.

Another former girlfriend testified that she had seen Parr construct about a dozen pipe bombs and use one to blow up a log. She also described Parr's obsession with chemicals and bombmaking books, and she mentioned seeing a small can of black powder, which Parr kept in the garage and was afraid he would be caught with. The third ex-girlfriend and the two former neighbors gave similar accounts.

Prosecutors also introduced a number of books and notebooks found in Parr's possession at the time of his earlier arrest for drug distribution, including *The Anarchist Cookbook,* a handbook from the 1970s that contains instructions for a litany of illicit activities ranging from the manufacture of illegal drugs and explosives to the creation and use of

various other weapons and telecommunication equipment. Finally, prosecutors presented expert testimony that Parr would have been capable of carrying out his threat.

The jury convicted Parr, and at sentencing the district judge applied two enhancements in calculating Parr's advisory sentence under the sentencing guidelines: a 12-level enhancement because Parr's offense "involved a crime of terrorism" and a 2-level enhancement for obstruction of justice based on a finding that Parr committed perjury at trial. *See* U.S.S.G. §§ 3A1.4, 3C1.1. The resulting advisory guidelines range was 360 months to life in prison. The judge considered a sentence within this range to be "grossly disproportionate" to the seriousness of Parr's offense, emphasizing that it was "unclear" whether Parr had actually intended to carry out his threat and noting that his threat was not imminent. The judge sentenced Parr to a below-guidelines term of 120 months in prison. Parr appealed both his conviction and sentence, and the government appealed the sentence.

II. Discussion

A. First Amendment Challenge and Related Claims of Evidentiary Error

Parr first argues that his conviction was unconstitutional because the statements for which he was convicted were protected by the First Amendment. But the First Amendment does not preclude restrictions on certain categories of speech having little or no social value, and threats are one such category. *Virginia v. Black*, 538 U.S. 343, 358-

59, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003). A statement qualifies as a "true threat," unprotected by the First Amendment, if it is "a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Id.* at 359, 123 S.Ct. 1536; *see also R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 388, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992); *Watts v. United States*, 394 U.S. 705, 707, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969) (distinguishing a threat from constitutionally protected speech such as political hyperbole).

We think it readily apparent that Parr's statements were threats, but ultimately that question was for the jury. *United States v. Saunders*, 166 F.3d 907, 912 (7th Cir.1999); *United States v. Schneider*, 910 F.2d 1569, 1570 (7th Cir.1990). The jury was properly instructed that Parr's statements qualified as a true threat if a reasonable person would understand that the statements, in their context and under all the circumstances, would be interpreted as "a serious expression of an intention to use a weapon of mass destruction to damage the Reuss Federal Plaza." The jury was also instructed that it must be satisfied that Parr "intended his statement[s] to be understood in that manner." The instruction continued as follows:

> A "true threat" is a serious statement expressing an intention to do an act which under the circumstances would cause apprehension in a reasonable person, as distinguished from idle or careless talk, exaggeration, or something said in a careless manner. To constitute a true threat, however, it is

> not necessary that [Parr] actually intended to use a weapon of mass destruction to damage the building or that he had the capacity to do so. Nor is it required that he communicated the threat to anyone connected with the Reuss Federal Plaza.

To the extent Parr is making an argument about the scope of the true threat doctrine and the proper definition of true threats, our review would be de novo. But at oral argument Parr explicitly disclaimed any challenge to the jury instructions. In convicting Parr, the jury implicitly found that Parr's statements were true threats based on the foregoing definition, and we can overturn the verdict only if Parr shows that there was no evidence to support it. *Saunders*, 166 F.3d at 912. The supporting evidence was abundant. Parr stated repeatedly and consistently that he was going to bomb the federal building in Milwaukee, and nothing in the context required the jury to find that he was joking or using hyperbole. *Cf. Watts*, 394 U.S. at 708, 89 S.Ct. 1399 (comments at political rally were political hyperbole as opposed to true threats, especially where crowd immediately laughed at the remarks and the speaker conditioned his threat on an event that he had vowed would never happen); *see also United States v. Guevara*, 408 F.3d 252, 258 (5th Cir.2005) (distinguishing true threat from "idle or careless talk, exaggeration, or something said in a joking manner").

It is true that Parr gave no precise time for carrying out his plan and did not relay his threats directly to his intended victim. But neither point is

dispositive. A threat doesn't need to be communicated directly to its victim or specify when it will be carried out. *Cf. Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 616-17 (5th Cir.2004) (threat must be "communicated to either the object of the threat *or a third person* " (emphasis omitted) (emphasis added)); *United States v. Howell*, 719 F.2d 1258, 1260 (5th Cir.1983) (time frame not specified).[1] Parr claimed his discussion of bombing the Milwaukee federal building was just prison "talk"-common among inmates who vent their frustrations against the government-but Schultz testified that Parr's statements were very different from the ordinary antigovernment hyperbole often heard in prisons. The jury was entitled to agree.

Parr's constitutional argument spills over into his various claims of evidentiary error, which can be consolidated under the umbrella of one basic question: what sort of evidence was relevant and admissible to prove that his statements qualified as a true threat? At trial the government called several of Parr's former girlfriends and neighbors to testify about his pervasive interest in explosives and

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[1] *See also United States v. England*, 507 F.3d 581, 589 (7th Cir.2007) (under witness tampering statute, threat need not be communicated to victim); *United States v. Stewart*, 420 F.3d 1007, 1016 (9th Cir.2005) (threat need not be communicated to victim); *Doe v. Pulaski County Spec. Sch. Dist.*, 306 F.3d 616, 624 (8th Cir.2002) (there must be communication to "the objects of the purported threat or to a third party"); *United States v. Martin*, 163 F.3d 1212, 1214-16 (10th Cir.1998) (defendant told friend he was going to kill police detective); *Schneider*, 910 F.2d at 1570-71 (letter threatening trial judge was mailed to the state supreme court); *United States v. Raymer*, 876 F.2d 383, 391 (5th Cir.1989) (victim need not actually receive threat).

domestic terrorism, including his long history of building pipe bombs, storing explosives, and experimenting with chemicals; his admiration for domestic terrorists Ted Kaczynski and Timothy McVeigh; and his use of the nickname "Uni," a reference to the Unabomber. Prosecutors also called an expert on explosives who testified that with practice, Parr would be capable of carrying out his plans. From this evidence the government asked the jury to infer that Parr was serious when he said he planned to bomb the federal building-that he actually intended to carry out his threats-and that he had the knowledge and ability to do so. Parr argues that his intent and ability to carry out his threats were irrelevant and the district judge abused his discretion in admitting this evidence.

It is well-established that the government is not required to prove that the defendant in a threat case intended or was able to *carry out* his threats. *Black,* 538 U.S. at 359-60, 123 S.Ct. 1536; *United States v. Fuller,* 387 F.3d 643, 647-48 (7th Cir.2004); *United States v. Hoffman,* 806 F.2d 703, 707 (7th Cir.1986). Antithreat statutes thus differ from attempt or conspiracy statutes, which require that the defendant intend or agree to commit the predicate crime. But it does not follow that Parr's intent was irrelevant.

To assess whether Parr's statements were true threats, the jury needed to make inferences from the background and context about his demeanor at the time he made the statements-to decide, under the circumstances, whether he conveyed the impression that he was serious or joking. A person who says he is going to bomb a

building is more likely to give the impression he is serious if he actually *is* serious-if he actually plans to carry out his threat and is able to do so. *See Guevara,* 408 F.3d at 258 (test for a threat is whether the statements "would cause apprehension in a reasonable person"). So if the government could show that Parr was serious about his plan to bomb the Milwaukee federal building, that evidence was highly relevant.

For the same reason, the background evidence was also relevant to whether Parr *intended* that his statements be understood as a threat-a question with added significance here because the jury was told it could convict only if Parr *intended* his comments to be understood that way. Traditionally, the law in this and most other circuits has been the opposite-an objective "reasonable person" test has applied, an inquiry that asks whether a reasonable speaker would understand that his statement would be interpreted as a threat (the "reasonable speaker" test) or alternatively, whether a reasonable listener would interpret the statement as a threat (the objective "reasonable listener" or "reasonable recipient" test). *See, e.g., United States v. Stewart,* 411 F.3d 825, 827-28 (7th Cir.2005); *Saunders,* 166 F.3d at 913-14 (collecting true threat cases and discussing the distinction between the "reasonable speaker" and "reasonable listener" approaches); *Schneider,* 910 F.2d at 1570-71. But the Supreme Court's decision in *Virginia v. Black, supra,* has raised some questions about whether that is still true.

In *Black,* the Supreme Court considered the constitutionality of a Virginia statute making it a

criminal offense to burn a cross with intent to intimidate. 538 U.S. at 347-48, 123 S.Ct. 1536. The Court invalidated the statute on First Amendment grounds, *id.* at 367, 123 S.Ct. 1536, but the justices were divided on the rationale. The case produced five opinions: a plurality opinion by Justice O'Connor (joined by Chief Justice Rehnquist, Justice Stevens-who also wrote a brief concurrence-and Justice Breyer); an opinion by Justice Scalia concurring in part and dissenting in part (joined in part by Justice Thomas); an opinion by Justice Souter concurring in part and dissenting in part (joined by Justices Kennedy and Ginsburg); and a dissent by Justice Thomas.

Most of the debate among the justices concerned the question of whether the statute impermissibly discriminated on the basis of content or viewpoint and the validity of a particular provision in the statute making the burning of a cross prima facie evidence of the defendant's intent to intimidate. For our purposes here, however, it is enough to note that the plurality offered a new definition of true threats, part of which we have quoted above. The entire passage is as follows:

> "True threats" encompass those statements where the speaker *means to communicate a serious expression of an intent to commit an act of unlawful violence* to a particular individual or group of individuals.... The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats "protect[s] individuals from the fear of violence" and "from the

> disruption that fear engenders," in addition to protecting people "from the possibility that the threatened violence will occur." Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.

Id. at 359-60, 123 S.Ct. 1536 (emphasis added) (citations omitted).

Based on the language we have highlighted, some circuits have held that a statement qualifies as a true threat only if the speaker subjectively intended it as a threat. *See United States v. Magleby,* 420 F.3d 1136, 1139 (10th Cir.2005); *United States v. Cassel,* 408 F.3d 622, 631 (9th Cir.2005); *see also United States v. Cope,* No. 06-5431, 2008 WL 2630366 (6th Cir. July 3, 2008) (unpublished) (discussing *Black* in the context of a threat statute and jury instructions that contained an intent element but deferring the question of whether the Supreme Court altered the definition of true threats in light of the procedural posture of the case).[2] The court in *Cassel* noted that the ultimate

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[2] Not all courts have agreed that *Black* changed the test for true threats. *See, e.g., Porter,* 393 F.3d at 616 (interpreting *Black* to require only that the speaker knowingly made the statement, not subjectively intended it as a threat). The Ninth Circuit is internally divided on the issue. In *Cassel,* 408 F.3d at 633, the court undertook a close analysis of the plurality and separate opinions in *Black* and held that speech qualifies as a true threat "only upon proof that the speaker subjectively intended the

holding in *Black*-that the Virginia statute was unconstitutional because its prima facie intent provision effectively eliminated the requirement of proving intent-also suggested that subjective intent to threaten was required. *Cassel,* 408 F.3d at 631. This circuit has not yet addressed the issue. *See Fuller,* 387 F.3d at 646 (a post- *Black* true threats case applying, without reference to *Black,* the traditional objective "reasonable person" test).

It is possible that the Court was not attempting a comprehensive redefinition of true threats in *Black;* the plurality's discussion of threat doctrine was very brief. It is more likely, however, that an entirely objective definition is no longer tenable. *See Cassel,* 408 F.3d at 631-33. But whether the Court meant to retire the objective "reasonable person" approach or to add a subjective intent requirement to the prevailing test for true threats is unclear. If the latter, then a standard that combines objective and subjective inquiries might satisfy the constitutional concern: the factfinder

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speech as a threat." The holding in *Cassel,* however, was not followed in *United States v. Romo,* 413 F.3d 1044, 1051 (9th Cir.2005); *Romo,* in turn, was questioned in *United States v. Stewart,* 420 F.3d 1007, 1017-18 (9th Cir.2005). *Stewart* did not attempt to reconcile the intracircuit conflict because the statute at issue in that case contained an intent element and the evidence established a true threat under either a subjective or objective definition. *Id.* The latest Ninth Circuit pronouncement on threat doctrine indicates that the conflict remains unresolved. *See Fogel v. Collins,* 531 F.3d 824, 831 (9th Cir.2008). For an excellent summary of post- *Black* developments on this issue, *see* Paul T. Crane, *"True Threats" and the Issue of Intent,* 92 VA. L.REV. 1225, 1261-68 (2006).

might be asked first to determine whether a reasonable person, under the circumstances, would interpret the speaker's statement as a threat, and second, whether the speaker intended it as a threat. In other words, the statement at issue must objectively *be* a threat and subjectively be *intended* as such.

We need not resolve the issue here. Parr asked the district court to instruct the jury on his intent, and the judge obliged, telling jurors they could convict only if Parr "intended his statement to be understood" as a threat. As we have noted, Parr did not challenge this instruction on appeal (it is doubtful he could have since he requested it), and at oral argument he disavowed any claim of instructional error. Parr put his intent at issue, and the jury was instructed to evaluate Parr's statements for their objective meaning *and* Parr's subjective intent. Accordingly, the background evidence of Parr's antigovernment convictions and his history of bombmaking was highly relevant.

Putting the intent issue to one side, there is a separate point here about the relevance of a speaker's attitudes and background in deciding whether a statement is a threat. An important purpose of antithreat statutes is to empower law enforcement to stop those who threaten violence before they attempt to carry out their threats-as we put it in a slightly different context, to allow police to arrest a would-be assassin before "the President finds himself staring down the barrel of a loaded gun." *Hoffman,* 806 F.2d at 707; *see also Fuller,* 387 F.3d at 647. To perform that function, law enforcement-the FBI, police, prosecutors-must

evaluate the speaker's statements, so an objective contextual interpretation matters. Of course, law enforcement officers have access to a wide variety of information about a suspect-among other things, the suspect's history of violence, experience with weaponry, background attitudes and activities-and all of this information will reasonably inform their interpretation of his statements.

In short, when a person says he plans to blow up a building, he will naturally be taken more seriously if he has a history of building bombs and supporting terrorism. The upshot is that in a threat case, information about the defendant's background is at least potentially relevant to gauging whether his statements qualify as a true threat. That isn't to say that all background information is admissible; the probative value must still be weighed against the potential for prejudice, *see* FED.R.EVID. 403, but related background evidence is relevant and potentially admissible.

Parr correctly notes that a number of our cases have assessed whether a statement is a threat by considering how the speaker should reasonably have expected it to be interpreted "'by those to whom the maker communicates a statement.'" *See, e.g., United States v. Khorrami,* 895 F.2d 1186, 1192-93 (7th Cir.1990) (quoting *Hoffman,* 806 F.2d at 707). Applied strictly, this language might suggest that a speaker's background is relevant only if it was known to (and therefore had the potential to affect the interpretation of) his intended audience-in this case, Parr's cellmate, who wasn't aware of all of the specifics of Parr's history as described by his former girlfriends and neighbors. But we have not applied

this test consistently. *See Saunders*, 166 F.3d at 913-14 (contrasting the "reasonable speaker" and "reasonable listener" cases); *United States v. Aman*, 31 F.3d 550, 553 (7th Cir.1994) (quoting *Schneider*) (applying a reasonable listener test); *Schneider*, 910 F.2d at 1570. Although our circuit "treats as relevant evidence both the victim's response to a statement and the victim's belief that it was a threat," *Saunders*, 166 F.3d at 913, we have never limited the inquiry to either the speaker's perspective *or* the targeted victim's perspective.

For example, in *Hoffman*, the defendant mailed a threatening letter to the President, and we thought it relevant that the Secret Service and the staff of the White House mailroom took the letter seriously, even though they weren't the targets of the threat. 806 F.2d at 712. Other information about the defendant's background was relevant to the analysis-for example, that he was a member of a group whose leader had been refused a pardon by the President-even though there was no evidence to suggest that this background information was known to either the White House staff or the President.[3]

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[3] *Hoffman* also considered this evidence as relevant to the defendant's "willfulness" in making the threat, a requirement the court apparently understood to mean that the defendant intended his statement to be understood as a threat. 806 F.2d at 706-07. The threat statute at issue in *Hoffman*, 18 U.S.C. § 871(a), prohibits any person from "knowingly and wilfully" making any threat of harm to the President; the opinion's discussion of the defendant's intent, however, centered not on the statute but on whether the First Amendment's threat doctrine required proof that the defendant intended to *carry out* the threat or simply proof that the defendant intended his statement to be interpreted as a threat.

Id. at 708-09. Other cases have also considered contextual information that wouldn't strictly be relevant if the inquiry were as limited as Parr suggests-for example, the reaction of the target of a threat even when the speaker did not communicate the threat to the target, *Schneider,* 910 F.2d at 1570, and even when the speaker tried to prevent the target from learning of it, *United States v. Martin,* 163 F.3d 1212, 1214-16 (10th Cir.1998).

The lesson of these cases is that the true threat determination is informed by but not limited to what the recipient or target of the alleged threat knew about the defendant. Contextual information-especially aspects of a defendant's background that have a bearing on whether his statements might reasonably be interpreted as a threat-is relevant and potentially admissible regardless of whether the recipient or targeted victim had full access to that information.

This brings us to the question of whether the evidence at issue here should have been admitted, which depends not just on its relevance but also on its potential to cause unfair prejudice. The district judge concluded that the relevance of the background evidence was not substantially outweighed by any potential for unfair prejudice, and that was not an abuse of his discretion. The jury knew from Parr's recorded statements that he claimed to have vast knowledge of and experience with explosives. Admitting evidence that his claims were actually true was hardly unfairly prejudicial to him. The challenged evidence was properly admitted.

There is, however, one evidentiary matter that

raises a separate concern. As part of its case, the government sought to introduce *The Anarchist Cookbook,* a book that Parr referenced in his prison-cell conversations and that had been found in his possession prior to his imprisonment. The judge initially held that only relevant portions of the book would be admitted into evidence, subject to a "specific showing of relevance" for each section admitted. But he later permitted the whole book to go to the jury during deliberations

That was an abuse of discretion. Although portions of the book were indeed relevant because Parr had discussed them in his conversation with Schultz and because they refuted his defense that he was merely engaged in hyperbole, much of the book was irrelevant. *The Anarchist Cookbook* is a hodgepodge of instructions for committing an array of illegal activities, many of which have nothing to do with explosives and could only risk inflaming the jury. So while the sections referring to homemade explosives were admissible, other sections-some of which describe the manufacture and use of drugs, guns, and other weaponry, for example-should not have been presented to the jury. *United States v. Rogers,* 270 F.3d 1076, 1081 (7th Cir.2001) ("the prosecutor should have been limited to using those portions of the book pertinent to the charge"). The proper approach would have been to photocopy and admit the relevant pages, rather than send the entire book to the jury room.

But we conclude the error was harmless. *See United States v. Sutton,* 337 F.3d 792, 797 (7th Cir.2003). The book was a very small portion of the government's case, and the evidence against Parr

was overwhelming, *see United States v. Holt,* 170 F.3d 698, 702 (7th Cir.1999) (improper admission of *The Anarchist Cookbook* was not reversible error when other evidence against defendant was "overwhelming"). The irrelevant sections of the book were never discussed during the trial, and the jury was specifically instructed that Parr was not on trial for his political views. We doubt that the jury focused undue attention on the irrelevant sections of the book.

B. Sentencing Issues

1. The Guidelines Enhancements

a. Obstruction-of-Justice Enhancement

Parr next challenges his sentence, arguing first that the district court improperly applied the obstruction-of-justice enhancement. *See* U.S.S.G. § 3C1.1. The judge found that Parr lied on the witness stand when he testified about his initial interview with the FBI. Contrary to Parr's argument, the district judge made the necessary findings to support his conclusion that Parr had perjured himself. The judge specifically found that Parr lied, that his lie was material, and that the lie was intentional. That was all that was required. *See United States v. Dunnigan,* 507 U.S. 87, 94-96, 113 S.Ct. 1111, 122 L.Ed.2d 445 (1993); *United States v. Freitag,* 230 F.3d 1019, 1026 (7th Cir.2000) (judge need only find that testimony was "intentionally given, false, and material").

Parr also contends that the court misinterpreted his testimony, but we see no clear error in the judge's interpretation. *See United*

States v. Jackson, 300 F.3d 740, 749 (7th Cir.2002). Parr testified that at his initial FBI interview, he admitted making the statements for which he was charged and said he told the agents that his comments weren't serious. He testified that by the end of his interview, he had decided to "lawyer up" and began denying everything. But he insisted he had initially been truthful with the FBI:

> [PARR]: At the beginning of the conversation they said did you intend to do this? And I said of course not.
>
> [PROSECUTOR]: And then they asked, did you say that you would do it? And you said of course not, right?
>
> [PARR]: No. I admitted that we'd had the conversation in the beginning, without saying specifically did you say this word? ... It wasn't that specific. In the beginning was did you have a conversation? Yes. Did you talk about blowing up the building? Yes. Were you gonna do it? No, of course not.

Parr later summed up his initial conversation with the FBI as follows: "I said it wasn't real; I didn't mean it. It wasn't real."

But one of the FBI agents who interviewed Parr told a completely different story. According to the agent, Parr initially denied having made the statements:

> [AGENT HAMMEN]: Again, as soon as we sat down with [Parr], we made it

> clear that we were there to get to the truth. To the bottom of this. What was going on. And again he denied-he put it on to his cell mate, and then denied it.
>
> [PROSECUTOR]: At any time did he tell you that he had made statements about making a bomb, but they were just make believe? Or responding to his cell mate? Or any kind of what you heard today?
>
> [AGENT HAMMEN]: No, he never brought that up.
>
> [PROSECUTOR]: Okay. So the explanations that Mr. Parr just gave about his interview are not consistent with your recollections?
>
> [AGENT HAMMEN]: That's correct.

It is hard to imagine how the agent's testimony and Parr's could be viewed as anything but contradictory. It was not clear error for the judge to interpret Parr's testimony as materially different from the FBI agent's, and to conclude that Parr had perjured himself. The obstruction-of-justice enhancement was properly applied.

b. Crime-of-Terrorism Enhancement

Parr next challenges the district court's application of U.S.S.G. § 3A1.4, which applies a 12-level enhancement for an "offense ... that involved, or was intended to promote, a federal crime of terrorism." The Application Notes provide that a "

'federal crime of terrorism' has the meaning given that term in 18 U.S.C. § 2332b(g)(5)." U.S.S.G. § 3A1.4 cmt. n. 1. That statute, in turn, defines a "[f]ederal crime of terrorism" as an offense that is (1) "calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct"; *and* (2) listed in 18 U.S.C. § 2332b(g)(5)(B)(i). 18 U.S.C. § 2332b(g)(5)(A) & (B). The definition is stated in the conjunctive, so both requirements must be met. Parr's crime of conviction is specifically listed in 18 U.S.C. § 2332b(g)(5)(B)(i); the only question is whether it met the first requirement.

The district judge found that Parr's threat was "not calculated to influence or affect the conduct of government" because it was uttered to his cellmate. Accordingly, he concluded that Parr's crime of conviction was not itself a "federal crime of terrorism." But the judge applied the guideline anyway because the act Parr *threatened* to commit-the bombing-*was* a crime of terrorism, and that meant his offense "involved" a crime of terrorism within the meaning of § 3A1.4.

The term "involve" as used in the guidelines is not quite so broad; it means "to include." *United States v. Arnaout,* 431 F.3d 994, 1001 (7th Cir.2005) (citing *United States v. Graham,* 275 F.3d 490, 516 (6th Cir.2001)). Thus, we have held that an offense "involves" a federal crime of terrorism only if the crime of conviction is itself a federal crime of terrorism. *Id.* On this understanding, if Parr's crime-the threat-was not itself a federal crime of terrorism as defined in § 2332b(g)(5)(A)*and* (B) (and the district court found that it was not), then the

offense did not "involve" a federal crime of terrorism.

Because of this error, we must vacate Parr's sentence and remand for resentencing. It is still possible, however, that § 3A1.4 might properly be applied on remand. The enhancement contains an alternative application: the guideline also applies if a purpose of Parr's offense was to "promote terrorism." The district court did not determine whether the "promote terrorism" variation of § 3A1.4 applies and should do so on remand. *See Arnaout,* 431 F.3d at 1002 ("[Section] 3A1.4 must be considered when a defendant is convicted of a federal crime of terrorism ... or when a defendant's felony conviction or relevant conduct has as one purpose the intent to promote a federal crime of terrorism."); *see also United States v. Mandhai,* 375 F.3d 1243, 1248 (11th Cir.2004) (the "promote" language in § 3A1.4 "cast[s] a broader net" than the "include" language, and "if [the defendant's] purpose is to promote a terrorism crime, the enhancement is triggered"); *United States v. Graham,* 275 F.3d 490, 516 (6th Cir.2001) ("A defendant who intends to promote a federal crime of terrorism has not necessarily completed, attempted, or conspired to commit the crime; instead the phrase implies that the defendant has as one purpose of his substantive count of conviction or his relevant conduct the intent to promote a federal crime of terrorism.").

2. The Government's Cross-appeal

Because we are vacating and remanding for resentencing, we do not reach the government's cross-appeal, which argued that the 10-year below-guidelines sentence was unreasonable. Parr's

sentence is indeed surprising-a full 20 years below the low end of the guidelines range of 360 months to life. In at least one recent case, we have reversed a deviation of similar proportional magnitude. *See United States v. Omole,* 523 F.3d 691, 698-99 (7th Cir.2008). And although such a large deviation might be reasonable in some circumstances, it would require a rather strong justification, *Gall v. United States,* --- U.S. ----, 128 S.Ct. 586, 597, 169 L.Ed.2d 445 (2007), which we aren't sure is present here. Nevertheless, after *Gall,* our review of a nonguideline sentence is extremely deferential. *See United States v. Carter,* 538 F.3d 784, 788-89 (7th Cir.2008). In light of the remand, however, we need not decide whether the district court's justification would survive review. We will not speculate on whether the guidelines range or the sentence will remain the same following resentencing; both may be challenged in a second appeal.

C. Miscellaneous Issues

Parr raises a number of other issues, which merit only brief mention. He argues, for example, that the judge improperly influenced the jury by mistakenly referring to him as "Mr. McVeigh" at one point during the trial. Parr's attorney did not object, move for a mistrial, or ask the judge to recuse himself, so we review for plain error, *see*FED.R.CRIM.P. 52(b), a standard that is not met here because the judge's comment had no potential to influence the jury. Indeed, it was clear from the context that the judge simply misspoke (this probably explains why Parr's attorney did not object), and in case there was any doubt, the judge immediately apologized and corrected himself.

Parr also argues that his sentence was unconstitutional under *Cunningham v. California*, 549 U.S. 270, 127 S.Ct. 856, 166 L.Ed.2d 856 (2007) because it was based on facts not found beyond a reasonable doubt by a jury. This argument has been repeatedly rejected. *United States v. Savage*, 505 F.3d 754, 764 (7th Cir.2007) (rejecting argument that *Cunningham* "precludes district judges from finding facts that may enhance sentences"); *United States v. Roti*, 484 F.3d 934, 937 (7th Cir.2007) ("*Cunningham*... has no effect on post-*Booker* federal practice.").

For the foregoing reasons, we AFFIRM the judgment of conviction, VACATE the sentence, and REMAND for resentencing.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

UNITED STATES of America,

Plaintiff,

v.

Steven J. PARR,

Defendant.

No. 04-CR-235.

July 10, 2006.

ORDER DENYING RULE 29 MOTION FOR JUDGMENT OF ACQUITTAL

WILLIAM C. GRIESBACH, District Judge.

On April 27, 2006, a jury returned a verdict finding defendant Steven J. Parr guilty of threatening to use a weapon of mass destruction (a bomb) to damage the Reuss Federal Plaza, a building housing various federal offices in Milwaukee, Wisconsin, in violation of Title 18 U.S.C. § 2332A(a)(3). Sentencing is scheduled for August 16, 2006. Presently before the court is the defendant's motion for judgment of acquittal pursuant to Rule 29 of the Federal Rules of Civil Procedure. For the reasons that follow, defendant's motion will be

denied.

A motion for judgment of acquittal notwithstanding the verdict raises the issue of whether the evidence is sufficient to sustain the conviction. In deciding such a motion, the court must view the evidence in the light most favorable to the government and defer to the credibility determinations made by the jury. *United States v. Jackson,* 177 F.3d 628, 630 (7th Cir.1999). The trial court can overturn a verdict "only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt."*United States v. Gougis,* 408 F.3d 735, 744 (7th Cir.2005) (internal quotations omitted). Given this degree of deference owed jury determinations, the Seventh Circuit has described the defendant's challenge to the sufficiency of the evidence to support a verdict as "a nearly insurmountable hurdle." *Id.*

Here, I find the evidence more than sufficient to support the jury's verdict. In truth, based on this court's instructions concerning the elements of the offense, the jury would have had difficulty reaching any other verdict. I instructed the jury that there were three elements to the crime charged in the indictment: (1) that the defendant threatened to use a weapon of mass destruction; (2) that the threat was against property owned, leased or used by the United States or any of its departments or agencies; and (3) that the threat was a true threat. I further instructed the jury that in order to find that the threat allegedly made by the defendant constituted a "true threat," they must find that:

> the statement attributed to the defendant was made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to use a weapon of mass destruction to damage the Reuss Federal Plaza. You must also be satisfied that the defendant intended his statement to be understood in that manner. A "true threat" is a serious statement expressing an intention to do an act which under the circumstances would cause apprehension in a reasonable person, as distinguished from idle or careless talk, exaggeration, or something said in a careless manner. To constitute a true threat, however, it is not necessary that Parr actually intended to use a weapon of mass destruction to damage the building or that he had the capacity to do so. Nor is it required that he communicated the threat to anyone connected with the Reuss Federal Plaza.

(Doc. # 147 at 9-10.)

This instruction was based on my analysis of the law under which the defendant was charged, as well as similar laws prohibiting threats against federal officers and employees, contained in my Decision and Order On Defendant's Motion To Exclude Rule 404(b) Evidence. (Doc. # 135 at 4-15.)

While defendant clearly disagrees with, and will presumably appeal, the court's determination of what is required for a finding of guilt under 18 U.S.C. § 2332A(a)(3) and what constitutes a true threat, those issues are separate and distinct from the question of whether the evidence presented was sufficient to sustain the jury's verdict. As to the latter issue, I conclude that the evidence was sufficient to support the jury's verdict, given my instructions on the law.

The most convincing evidence against the defendant were his own words which unequivocally described a plan to use an explosive device to cause significant damage to the Reuss Federal Plaza and serious injury or loss of life to those that worked there. Much of the remaining evidence offered by the government was intended to show that the defendant was indeed serious about his plan and that he had taken steps to develop the capacity to carry it out. Even the defendant did not deny that he had made such a threat. Given the audio recording obtained by his cell-mate, denial was not really an option. Instead, the defendant argued that the threat was not a true threat but rather the product of his intense feelings of insecurity. Defendant testified that he was simply a "loser" who made up grandiose stories in order to get attention from others. His brother and a psychologist corroborated his claim. But they also conceded, at least implicitly, that in order to succeed in getting attention from others, the defendant had to make his stories believable. Thus, he had to make his threats sound like "true threats." In effect, the defense amounted to a concession that the defendant was guilty of the crime, as I had

defined it for the jury, but claimed the defendant was more to be pitied than feared. The jury apparently rejected such a defense.

This case presents important questions concerning the extent to which government may punish mere threats. In the course of the trial and pretrial proceedings, this court has set forth its understanding of the present state of the law as it bears on those issues. If the court erred in its analysis of the law or in its evidentiary rulings, defendant will be entitled to a new trial. But based on the law as it was explained to the jury, I find that the evidence present clearly supports the jury's verdict. Accordingly, defendant's motion for judgment of acquittal is denied.

SO ORDERED this 10th day of July, 2006.

s/ William C. Griesbach
WILLIAM C. GRIESBACH
United States District Judge

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

Steven J. PARR,

Defendant.

No. 04-CR-235.

March 16, 2006.

ORDER DENYING DEFENDANT'S MOTIONS TO SUPPRESS

GRIESBACH, J.

On October 5, 2004, a federal grand jury sitting in this district returned a one-count indictment against Defendant Steven J. Parr, charging him with planning to use a weapon of mass destruction (a bomb) to damage a federal building in Milwaukee, Wisconsin, in violation of Title 18 U.S.C. § 2332A. On October 13, 2004, the defendant appeared before Magistrate Judge James Sickel for arraignment and entered a plea of not guilty. Thereafter, the defendant filed a motion to suppress the statement he is alleged to have made to FBI agents in the course of a custodial interview following his arrest and a motion to suppress

physical evidence obtained on four separate occasions. The physical evidence defendant seeks to exclude at trial includes items seized under the following circumstances: (1) as a result of a search of his possessions at Oshkosh Correctional Institution where he was serving a sentence; (2) as a result of the execution of a search warrant on the home in which he was living on July 18, 2001; (3) the search of his possessions that were turned over to law enforcement by Linda Williamson, his former girlfriend; and (4) a search of items turned over to law enforcement by David Parr, the defendant's brother.

As is the practice in this district, the motions were referred to the assigned magistrate judge pursuant to 28 U.S.C. § 636(b)(1)(B). Magistrate Judge Patricia J. Gorence conducted an evidentiary hearing and issued a thorough report recommending that the motions to suppress be denied. The defendant filed timely objections to Judge Gorence's recommendation and the government has now filed its response. Having now reviewed the transcript of the evidentiary hearings held before Judge Gorence and considered the recommendation and the objections, as well as the government's response, I hereby adopt Judge Gorence's thorough analysis of the issues raised by the defendant's motions and adopt it as my own. On that basis and for the additional reasons stated herein, I conclude that the motions to suppress should be denied.

1. Motion To Suppress Statement

Defendant's motion to suppress his statement is based upon his contention that he had been

unlawfully detained by state authorities prior to his arrest by the federal agents. The defendant was scheduled to be released from Oshkosh Correctional Institution to a half-way house in Rock County on September 21, 2004. Prior to his release, FBI agents had learned of his alleged plan to blow up the federal office building in Milwaukee. FBI agents conveyed this information, along with the fact that President Bush was going to be visiting the area later that week, to agents of the Wisconsin Department of Corrections (DOC), who were supervising defendant following his release from prison. On the basis of the information conveyed by the FBI, including the more general information concerning the defendant's criminal history, DOC officials elected to detain the defendant to prevent potential violations. The defendant was therefore placed in custody at the Rock County Jail under the authority of his parole agent.

Defendant contends that his detention at the Rock County Jail on September 22, 2004 was illegal because the DOC officials acted on the recommendation of the FBI. There is no doubt that agents of the FBI wanted Wisconsin DOC officials to take defendant into custody based on the information they had received. But this does not change the fact that it was DOC agents, and not the FBI, that made the decision to transfer defendant's custody from a halfway house to the Rock County Jail on September 22, 2004. Because the decision to place the defendant back into secure custody was made by State officers under State law, it is State law that governs the determination of whether the detention was lawful.

Wisconsin law clearly authorizes placing an

individual on extended supervision in custody under the circumstances present here. DOC regulations require that clients be taken into custody and detained "if the client is alleged to have been involved in assaultive or dangerous conduct." Wis. Adm.Code § 328.22(1). In addition, agents may take clients into custody and detain them under the following circumstances:

> (a) For investigation of an alleged violation by the client;
>
> (b) After an alleged violation by the client to determine whether to commence revocation proceedings;
>
> (c) For disciplinary purposes; or
>
> (d) To prevent a possible violation by the client.

Wis. Adm.Code. § DOC 328.22(2). Although the threat to blow up the Reuss Federal Building was allegedly made prior to the defendant's term of extended supervision, the authority granted agents to prevent violations by the client and protect the public is sufficient to justify the decision to detain him on the basis of the information provided by the FBI.

In this connection, it is important to note that at the time of his detention, defendant was still serving a sentence for a crime of which he was lawfully convicted. His constitutional right to liberty was therefore more limited than that of ordinary citizens. As the Seventh Circuit explained in *Knox v. Smith*, "parolees have a more limited liberty interest

than ordinary citizens."342 F.3d 641, 657 (7th Cir.2003).*See also Morrissey v. Brewer,* 408 U.S. 471, 480, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) ("Revocation [of parole] deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions."). Because of this reduced liberty interest, the arrest of a parolee or, in this case, one on extended supervision, is lawful if based upon a reasonable suspicion that the grounds justifying detention are present. *Knox,* 342 F.3d at 657 (citing *United States v. Knights,* 534 U.S. 112, 121, 122 S.Ct. 587, 151 L.Ed.2d 497 (2001)). The evidence upon which the DOC agents based their decision to detain defendant was sufficient to meet this standard.

Defendant also complains that the initial detention was authorized for three days-from Wednesday, September 22, 2004 through Friday, September 24, 2004. DOC Supervisor Mary Lee testified that DOC agents were authorized to detain clients for up to three days, excluding weekends and holidays, which could be extended an additional three working days upon approval of a supervisor under Wis. Adm.Code § DOC 328.22.[1] Tr. 9-10. Although the decision to extend defendant's detention was made on Friday, September 24, the authorizing document was not signed until Monday, September 27, 2004. Tr. 24. The extension

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[1] The current version of Wis. Adm. Code § DOC 328.22 authorizes an initial detention for five working days, with an additional five-day extension upon approval of the regional chief. The discrepancy with Supervisor Lee's testimony remains a mystery, at least to this court.

authorized further detention through September 29, 2004, at which time the defendant was arrested on the federal warrant. It was at that point, following his arrest on the federal charge, that defendant was interviewed by federal agents and made the statement he now seeks to suppress.

Although he does not deny that he was fully advised of his *Miranda* rights and makes no claim that his waiver of those rights and resulting statement were coerced or involuntary, defendant nevertheless argues that his detention by state DOC agents was illegal because the extension was not signed until after the initial detention order expired and his confession must therefore be suppressed. I agree with Judge Gorence's conclusion that even if the document authorizing the extension of defendant's detention was not signed until after the initial order expired, the extension was valid. Moreover, under DOC regulations, weekends are excluded from the computation, and thus the extension would not have expired until the following Monday in any event. It therefore follows that the defendant was not illegally detained.

Even if defendant's detention was unlawful, however, Judge Gorence further concluded that the challenged statement was not made until he was lawfully arrested on the federal charge and fully advised of his *Miranda* warnings. Based on *Reed v. United States,* 349 F.3d 457 (7th Cir.2003), Judge Gorence concluded that the federal arrest and the *Miranda* warnings administered by the agents constituted a sufficient intervening circumstance to dissipate any taint caused by the defendant's detention. I agree. Defendant was advised of his

Miranda rights, his confession was voluntary, and there is no evidence that the FBI agents involved in the investigation intentionally engaged in any misconduct. While little or no time elapsed between the allegedly unlawful custody of the defendant and his statement, it must be remembered that he enjoyed only the limited freedom of a parolee in any event. In the meantime, he was arrested on a federal warrant. Under these circumstances and given the significant intervening event of his lawful arrest on a federal warrant, I conclude that any taint that otherwise existed was dissipated. *See United States v. Green,* 111 F.3d 515, 522 (7th Cir.1997). Accordingly, the motion to suppress defendant's statement will be denied.

2. Motion To Suppress Physical Evidence

Defendant also moved to suppress certain physical evidence obtained in the July, 2001 search of his home pursuant to a search warrant issued in Rock County. The search warrant was issued upon probable cause to believe that the defendant had been involved in marijuana sales. In the course of the search, the investigating officers seized two items that defendant now challenges. The first is a book titled THE ANARCHIST COOKBOOK. The cookbook contains directions on how to grow marijuana, how to make bombs, and how to make LSD. It also contains sections about growing marijuana and has different recipes for use and consumption of marijuana. In addition, a writing tablet that was on a coffee table next to THE ANARCHIST COOKBOOK was seized by the officers. The writing tablet contains handwritten chemistry formulas that the government apparently intends to introduce as

evidence in this case. Defendant contends that the cookbook and tablet are not admissible because they were illegally seized. He contends that the articles were not properly seized under the warrant issued in 2001 and that they do not constitute contraband.

Here again, Magistrate Judge Gorence carefully considered the defendant's arguments and concluded that the motion should be denied. I agree. The agents were authorized to search for:

> marijuana and other controlled substances, scales, packaging materials, drug paraphernalia, drug ledgers, address/phone records, indicia of occupancy, . opened or unopened financial documents relating to drug proceeds, U.S. currency and any and all instrumentality, substances or documents which are in violation of possession of controlled substance with intent to deliver/THC, contrary to § 951.41(1)(m)(h) of Wisconsin Statutes.

Given the broad description of the items the agents were authorized to seize, their seizure of the cookbook and the writing tablet were appropriate. The fact that the cookbook contained instructions on growing marijuana, as well as other drugs, made it relevant to the charge the agents were investigating. This would have been immediately apparent upon inspecting the cookbook. The writing tablet next to the cookbook with handwritten notations would also have been relevant. The handwritten notations, assuming that the notations were from information in the cookbook, would have linked the possession

and use of the cookbook to the author of the handwriting. Even by itself, the handwriting, assuming that it could be identified, would have constituted "indicia of occupancy," seizure of which the warrant specifically authorized. Under these circumstances, I conclude that defendant's motion to suppress this evidence should be denied.

Defendant next sought suppression of the items copied from his property at Oshkosh Correctional Institution. Defendant contends that he had an expectation of privacy of those documents that were in storage and that had been packed in contemplation of his release. In addition, defendant contends that a heightened expectation of privacy exists for certain documents which he contends constituted personal records relating to an anger management course he was taking in prison.

It is well established that inmates in a correctional facility have no expectation of privacy over their property. An exception exists for legal mail, but in all other respects, correctional officials have the right to search the inmates property, including reading non-legal mail. Although defendant argues that he retains an expectation of privacy over property retained in the prison storage facility, he cites no evidence in support of such a principle, nor is any rationale for such a principle apparent. Correctional officials have a right to insure that property that they maintain, as well as property held by the inmates themselves, does not contain contraband or evidence of a crime. Thus, the Supreme Court has stated unequivocally that prisoners have no reasonable expectation of privacy in their cell. *Hudson v. Palmer*, 468 U.S. 517, 526,

104 S.Ct. 3194, 82 L.Ed.2d 393 (1984). If a prisoner has no expectation of privacy over property retained in his living quarters, it makes even less sense that he would have such an expectation over property held in storage by the institution.

Defendant's contention that his papers relating to his anger management course should be suppressed also finds no basis in federal law. Evidence is suppressed when it is unconstitutionally seized. *See Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). As already noted, defendant had no expectation of privacy over his property in a prison setting. While plaintiff does cite Wisconsin DOC regulations that afford such materials a limited privilege, these state regulations provide no justification for suppressing such evidence once it has been unconstitutionally obtained. Federal questions of evidentiary privilege are governed by Rule 501 of the Federal Rules of Evidence and are not before me at this time. Thus, regardless of whether the documents constitute plaintiff's personal papers relating to his anger management course, the motion to suppress should be denied.[2]

Finally, defendant seeks suppression of items delivered to FBI agents by his former girlfriend and his brother. These were books and personal effects that the defendant left with his girlfriend prior to his

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[2] Defendant requested an evidentiary hearing so that he could supplement the record and establish his interest in the writings and their link to his anger management program. Given my ruling that his motion should be denied even if the materials are precisely what he claims them to be, no evidentiary hearing is necessary. Accordingly, defendants request for a further hearing is denied.

incarceration, as well as items removed from his former home by his brother. Both Ms. Williamson, the defendant's former girlfriend, and his brother voluntarily turned the items over to the FBI. Neither had been given any instructions by the defendant as to how the property was to be maintained. No restrictions were placed on their use of it and the items themselves were kept in bags and boxes. Defendant argues that as bailees of his property, Ms. Williamson and his brother lacked either the actual or apparent authority to consent to the search of these items by law enforcement.

Here also, Judge Gorence's thorough analysis is more than sufficient to address the defendant's motion. A person who entrusts his property to a third person without placing any limitations upon the authority of the third party over that property assumes the risk that he will allow others access to it. *United States v. Basinski,* 226 F.3d 829, 834 (7th Cir.2000). Here, there is no evidence that defendant imposed any limitations upon the authority of his former girlfriend or his brother over access to his property. The property left with his former girlfriend was contained in open bags and boxes. His brother, on the other hand, took it upon himself apparently to clean out his former apartment. Given these circumstances, it is clear that both had actual authority to inspect the property themselves and thus to permit law enforcement access to it.

In sum, based upon my review of the transcripts of the hearings before Magistrate Judge Gorence, and her thorough report and recommendation, I conclude that the motions to suppress should be denied. I also find no need for

further hearing since the objection raised entirely legal issues not dependent upon facts that are not otherwise clear on the record. Accordingly, the motion to suppress statement and motion to suppress physical evidence are denied.

SO ORDERED this 15th day of March, 2006.

s/ William C. Griesbach
WILLIAM C. GRIESBACH
United States District Judge

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

SEALED[1]

UNITED STATES OF AMERICA,

Plaintiff,

v.

STEVEN J. PARR,

Defendant.

Case No. 04-CR-235

April 12, 2006

REVISED DECISION AND ORDER ON DEFENDANT'S MOTIONTO EXCLUDE RULE 404(b) EVIDENCE[2]

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[1] I have ordered the government's notice of Rule 404(b) evidence, the defendant's motion to exclude such evidence and all briefs and other filings addressing the issue, including this court's decision and that of the magistrate judge, temporarily sealed so as to avoid any pretrial publicity which could taint the jury panel by exposing them to evidence that may be excluded from trial. I am mindful of the Seventh Circuit's strong admonition against unnecessarily sealing court documents. *See Hicklin Engineering, L.C. v. Bartell*, 439 F.3d 346, (7th Cir. 2006). I conclude, however, that the interest of the public and the defendant in insuring a fair and impartial jury is selected to decide this case outweighs the public interest in immediate access to this portion of the record. Once the jury is selected, all filings related to this issue will be unsealed.

[2] This is a corrected version of the Decision and Order entered under seal yesterday. The decision was filed before final proofreading so that the parties would have an opportunity to

On October 5, 2004, a federal grand jury sitting in this district returned a one-count indictment against Defendant Steven J. Parr, charging him with threatening to use a weapon of mass destruction (a bomb) to damage a federal building in Milwaukee, Wisconsin, in violation of Title 18 U.S.C. § 2332A(a)(3). On October 13, 2004, Parr appeared before Magistrate Judge James Sickel for arraignment and entered a plea of not guilty. As is the practice in this district, the case was then referred to the assigned magistrate judge pursuant to 28 U.S.C. § 636(b)(1)(B) for pretrial proceedings.

Among the pretrial motions addressed to the magistrate judge was the defendant's motion to exclude all of the evidence the government identified in its Notice of Intent to Rely Upon 404(b) Evidence (Doc. # 39). In its Notice, the government divided the evidence it intends to introduce into seven separate categories:

1. Parr's knowledge of chemicals/explosives;

2. Parr's actual or stated intention to use chemical/explosive devices;

3. Parr's possession of chemical/bomb making books and paraphernalia;

4. Parr's threats against others;

5. Parr's threat to destroy the Rock County Courthouse;

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read it before today's final pretrial. The only changes are grammatical or stylistic.

6. Parr's desire to emulate Timothy McVeigh and the "Unabomber";

7. Parr's actual physical harm to others.

(Doc. # 39.)

On March 16, 2006, Magistrate Judge Patricia J. Gorence issued her Decision and Order granting in part and denying in part defendant's motion. Both parties timely filed objections and the case is now before me for de novo review. Although I agree with Magistrate Judge Gorence that defendant's motion should be granted in part and denied in part, I differ slightly in my analysis and conclusion as to what evidence will be allowed. Before addressing the specific issues raised by the parties, however, it is necessary to briefly describe the elements of the crime charged, the requirements for Rule 404(b) evidence, and the factual allegations upon which the charge is based. I begin with the facts alleged.

I. Factual Allegations

The charge in the indictment reads:

> between on or about August 17, 2004, and September 20, 2004, in the State and Eastern District of Wisconsin and elsewhere, Steven J. Parr, without lawful authority did threaten to use a weapon of mass destruction against property leased and used by the United States and departments and agencies of the United States.

(Doc. # 6.) The property allegedly threatened by Parr was the Reuss Federal Plaza located in Milwaukee.[3]

Further details can be gleaned from the affidavit filed in support of the criminal complaint. (Doc. # 1.) It appears that the matter first came to the attention of authorities when an inmate in the Wisconsin prison system wrote letters to the Milwaukee field office of the Secret Service and the Chicago Office of the Federal Bureau of Investigation informing both offices that "somebody is making plans to blow up the federal building in Milwaukee." (*Id.* ¶ 3.) The inmate, identified as CW#1 in the affidavit, was later interviewed by special agents of the FBI and the Department of Homeland Security and described a series of conversations he had with Parr, who was his cellmate at the time, in which Parr told CW#1 of his plans to blow up a federal building in Milwaukee.[4] Although there are two federal buildings in Milwaukee, Parr's description of the building he intended to target (close to the street and lots of glass) fit the Reuss Federal Plaza, as opposed to the federal courthouse. (*Id.* ¶¶ 8-9.)

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[3] The indictment, which was returned in the aftermath of the Supreme Court's decision in *Blakely v. Washington*, 542 U.S. 296 (2004), but before its decision in *United States v. Booker*, 543 U.S. 220 (2005), also included two sentencing allegations in order to insure that the United States Sentencing Guidelines could be constitutionally applied. Booker renders these allegations surplusage and they have been stricken without objection.

[4] Parr was serving a two-year sentence of confinement for possession with intent to deliver and delivery of Tetrahydracannibinols (THC) in violation of Wis. Stat. §§ 961.41(1m)(h) and 961.41(1)(h). (*Id.* ¶ 7.)

According to CW#1, Parr claimed he had extensive knowledge of bombs and bomb making, and that he had the ability to create sophisticated explosive devices using fertilizers and other chemicals such as uric acid. (*Id.* ¶ 8.) CW#1 claimed that he had a college degree in chemistry but that Parr "knows way more than I do." (*Id.* ¶ 4.) CW#1 also told the investigating agents that Parr "hated the government" and regarded Ted Kaczynski, the notorious "Unabomber," as his hero.[5] (*Id.* ¶¶ 4-5.) Parr also spoke admiringly of Timothy McVeigh, who had killed 168 people and injured hundreds of others when he exploding a bomb outside of the Alfred P. Murrah Federal Building in Oklahoma City in 1995. (*Id.* ¶¶ 12-13.)[6]

To corroborate the information provided by CW#1, the investigating agents placed a recording device on him and returned him to his cell where he engaged Parr in further extensive discussions regarding Parr's bomb making experience, knowledge, capabilities and intentions. (*Id.* ¶ 14.) In the conversations that followed, significant portions of which are recounted in the supporting affidavit, Parr describes in detail his past experience and knowledge of bomb making in general and his plans for blowing up a federal building in downtown Milwaukee. (*Id.* ¶¶ 15-25.) Shortly thereafter,

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[5] Kaczynski killed three people and seriously injured two others by sending explosive devices through the mail until his arrest and ultimate conviction in 1998. He is presently serving a life sentence. *See U.S. v. Kaczynski*, 239 F.3d 1108 (9th Cir. 2001), *cert. denied*, 535 U.S. 933 (2002).

[6] McVeigh was convicted and sentenced to death for his role in the offense. *See United States v. McVeigh*, 153 F.3d 1166 (10th Cir. 1998). He was executed on June 11, 2001.

having completed his sentence of confinement, Parr was released to a halfway house on supervision. Approximately one week later, Parr was taken into federal custody on the charge of threatening to use a weapon of mass destruction to damage a federal building. Outside of his communications with CW#1, there is no evidence that Parr ever communicated his plan to blow up a federal building in Milwaukee to anyone else.

II. Elements Of The Offense

Parr is charged with threatening to use a weapon of mass destruction to damage a federal building. The pertinent language of the statute reads:

> (a) A person who, without lawful authority, uses, threatens, or attempts or conspires to use, a weapon of mass destruction– . . . (3) against any property that is owned, leased or used by the United States or by any department or agency of the United States, whether the property is within or outside the United States . . . shall be imprisoned for any term of years or for life, and if death results, shall be punished by death or imprisoned for any term of years or for life.

18 U.S.C. § 1332a(a)(3). The term "weapon of mass destruction" is defined as "any destructive device as defined in section 921 of this title, 18 U.S.C. § 2332a(c)(2)(A), which in turn means "any explosive, incendiary, or poison gas– (i) bomb . . . or (vi) device

similar to any of the devices described in the preceding clauses." 18 U.S.C. § 921(a)(4).

Section 2332a was originally enacted in 1994 as part of the Violent Crime Control and Law Enforcement Act based on Congress' finding that the use or threatened use of weapons of mass destruction would "gravely harm the national security interests of the United States, seriously affect interstate and foreign commerce, and disturb the domestic tranquility of the United States. Deborah F. Buckman, Annotation, Validity, Construction, and Application of 18 U.S.C. § 2332a Prohibiting Use or Threat, Attempt, or Conspiracy to Use Certain Weapons of Mass Destruction, 199 A.L.R. Fed. 1 (2005), § 2(a) (citing H.R. Conf. Rep. No. 102-405 at 46). The original version of the statute aimed at use or attempt to use or conspiracy to use weapons of mass destruction and made no mention of threats. *Id.* It was amended as part of the Antiterrorism and Effective Death Penalty Act of 1996 to cover those who threaten the use of weapons of mass destruction for certain specified purposes, including causing damage to federal property. *Id.*

Based upon the plain language of § 2332a(a)(3), it appears there are only two essential elements to the charge against Parr: (1) that he threatened to use a weapon of mass destruction, (2) against property owned, leased or used by the United States or any of its departments or agencies. (Doc. # 105 at 5.) Key to understanding the government's argument in opposition to Parr's motion to exclude its proffered Rule 404(b) evidence, however, is its proposed definition of the term "threaten."

Although the Seventh Circuit has yet to address a case involving the threatened use of a weapon of mass destruction, the Fifth Circuit has done so on three separate occasions. In *United States v. Wise*, 221 F.3d 140 (5th Cir. 2000), the Fifth Circuit in reviewing a conviction for threatening to use a weapon of mass destruction in violation of 18 U.S.C. § 2332a(a)(2) held that the claim that a defendant acted with lawful authority was not an element of the offense but an affirmative defense, the burden of which to prove was on the defendant.

In *United States v. Reynolds*, 381 F.3d 404 (5th Cir. 2004), the Fifth Circuit again addressed the elements of an offense under § 2332a. In *Reynolds*, the defendant called the customer service representative over a dispute with his mortgage company over delinquent payments and said, "I just dumped anthrax in your air conditioner." *Id.* at 405. He was charged under § 2332a(a)(2), which prohibits threatening the use of weapons of mass destruction against person or property in the United States so as to "affect interstate commerce." A jury found the defendant guilty, and he was sentenced to 51 months. On appeal, the Fifth Circuit rejected the defendant's argument that because the alleged threat was a statement as to past conduct and not intent to do damage in the future, it could not be considered a threat within the meaning of the statute. The court found "no credible support for a definition of "threat" that requires reference to a future act." 381 F.3d at 406. Defining the word "threat" to mean "a communication that has a reasonable tendency to create apprehension that originator of the communication will act as

represented," the court found the evidence sufficient to support the jury's finding that the defendant had threatened the use of a weapon of mass destruction. *Id.*

In *United States v. Guevara*, 408 F.3d 252 (5th Cir. 2005), the Fifth Circuit applied § 2332a to another "anthrax hoax." In *Guevara*, the defendant sent a letter containing a white powder to a federal judge accompanied by a letter stating, "I am sick and tired of your games[.] All [A]mericans will die as well as you. You have been now been [sic] exposure [sic] to anthrax." 408 F.3d at 255. On appeal following the defendant's conviction, the Fifth Circuit again rejected the argument that the term "threaten," as used in the statute, required reference to a future act. *Id.* 256-57. The court also approved the following instruction the district court had given to the jury:

> A threat is a serious statement expressing an intention to do an act which under the circumstances would cause apprehension in a reasonable person, as distinguished from idle or careless talk, exaggeration, or something said in a joking manner. It is not necessary to prove that the defendant actually intended or was able to carry out the threat made.

Id. at 257-58.

The Fifth Circuit's construction of the term "threat" in § 2332a is consistent with the Supreme Court's construction of the term in the context of a

statute prohibiting threats against the President in *Watts v. United States*, 394 U.S. 705 (1969). In Watts, the Court, in a *per curiam* opinion, reversed the conviction of a defendant who was arrested at a public rally on the grounds of the Washington Monument when, after noting that he had just received his draft notice, he stated, "I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." L.B.J., of course, referred to Lyndon Baines Johnson, who was then President of the United States. The defendant was convicted of violating 18 U.S.C. § 871, which subjects to criminal penalties anyone who "knowingly and willfully deposits for conveyance in the mail or for a delivery from any post office or by any letter carrier any letter, paper, writing, print, missive, or document containing any threat to take the life of, to kidnap, or to inflict bodily harm upon the President of the United States . . . or knowingly and willfully otherwise makes any such threat against the President . . . ." After first acknowledging that "[c]ertainly the statute under which petitioner was convicted is constitutional on its face," 394 U.S. at 707, the Court stated "[n]evertheless, a statute such as this one, which makes criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind. What is a threat must be distinguished from what is constitutionally protected speech." *Id.* Leaving aside the question whether the "willfulness" requirement of the statute meant that a defendant must have intended to carry out his threat, the Court held that at the very least the government must prove the defendant made "a true threat." *Id.* at 708. With

respect to the specific statement upon which Watts' conviction was based, the Court continued:

> We do not believe that the kind of political hyperbole indulged in by petitioner fits within that statutory term. For we must interpret the language Congress chose "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). The language of the political arena, like the language used in labor disputes, *see Linn v. United Plant Guard Workers of America*, 383 U.S. 53, 58 (1966), is often vituperative, abusive, and inexact. We agree with petitioner that his only offense here was "a kind of very crude offensive method of stating a political opposition to the President." Taken in context, and regarding the expressly conditional nature of the statement and the reaction of the listeners, we do not see how it could be interpreted otherwise.

Id.

The same statute was again before the Court in *Rogers v. United States*, 422 U.S. 35 (1975).

Although the defendant's conviction in Rogers was reversed on procedural grounds and the majority found no need to address the meaning of the term "threat" as used in the statute, Justice Marshall noted in concurrence that the statute was intended to cover even threats that were not intended to be carried out:

> Plainly, threats may be costly and dangerous to society in a variety of ways, even when their authors have no intention whatever of carrying them out. Like a threat to blow up a building, a serious threat on the President's life is enormously disruptive and involves substantial costs to the Government. A threat made with no present intention of carrying it out may still restrict the President's movements and require a reaction from those charged with protecting the President. Because s 871 was intended to prevent not simply attempts on the President's life, but also the harm associated with the threat itself, I believe that the statute should be construed to proscribe all threats that the speaker intends to be interpreted as expressions of an intent to kill or injure the President. This construction requires proof that the defendant intended to make a threatening statement, and that the statement he made was in fact threatening in nature.

422 U.S. at 46-47 (Marshall, J., concurring).

Justice Marshall's concurring opinion makes clear that § 871 was intended to guard against two separate and distinct evils. The first and by far the most serious was the death or serious injury to the President. As the Court had recognized in Watts, "[t]he Nation undoubtedly has a valid, even an overwhelming, interest in protecting the safety of its Chief Executive and in allowing him to perform his duties without interference from threats of physical violence." 394 U.S. at 707. The second evil the statute sought to prevent was the disruption that resulted and the substantial costs the government was forced to incur to investigate and protect the President against such threats, even when there was no plan to carry them out. While less serious than the first, the second evil the statute sought to avoid was by no means insignificant. It was with these dual purposes in mind that the Seventh Circuit addressed the issue in *United States v. Hoffman*, 806 F.2d 703 (7th Cir. 1986). In *Hoffman*, the Seventh Circuit affirmed the conviction of a defendant who sent a note to then President Ronald Reagan reading: "Ronnie, Listen Chump? Resign or You'll Get Your Brains Blown Out." The note also contained a crude drawing of a pistol with a bullet emerging from the barrel. The defendant was found guilty of violating 18 U.S.C. § 871 and appealed. In affirming the defendant's conviction, the court rejected the argument of the dissent that to prove that the threat was a "true threat," the government was required to establish that defendant actually intended to carry it out and had the ability to do so. To require such a showing, the majority held, "would, in effect, preclude those charged with the safety of the President from protecting the President until

that very moment when the President finds himself staring down the barrel of a loaded gun." *Hoffman*, 806 F.2d at 707. At the very least, it would render the statute ineffective against the second evil it was intended to prevent. The court therefore held that in order to establish a "true threat," the government must demonstrate that "the defendant made a statement 'in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm upon or to take the life of the President.'" Id. (quoting *Roy v. United States*, 416 F.2d 874, 877 (9th Cir.1969)). Agreeing with the Second Circuit that "it is the utterance which the statute makes criminal, not the specific intent to carry out the threat . . .", *United States v. Kelner*, 534 F.2d 1020, 1025 (2nd Cir.1976), the *Hoffman* majority held that "[c]ontrary to the dissent's interpretation of case law, the government is not required to establish that the defendant actually intended to carry out the threat." 806 F.2d at 707.

In *United States v. Khorrami*, 895 F.2d 1186 (7th Cir.), cert. denied, 498 U.S. 986 (1990), and *United States v. Saunders*, 166 F.3d 907 (7th Cir. 1999), the Seventh Circuit again addressed the question of what must be shown to establish that a threat constitutes a true threat. In *Khorrami* the issue arose in the context of a prosecution for mailing a threatening communication in violation of 18 U.S.C. § 876, and in Saunders the charge was threatening a federal judge with intent to impede, intimidate or interfere while in the performance of

official duties contrary to 18 U.S.C. § 115(a)(1)(B). In affirming the defendants' convictions in both cases, the court made clear that the test for determining whether the alleged threat constitutes a "true threat" is an objective one that focuses on whether the speaker would have foreseen that the person to whom he made the statement would take his words seriously. *Khorrami*, 895 F.2d at 1192; *Saunders*, 166 F.3d at 913 ("This objective standard presented in Khorrami focuses on whether a reasonable speaker would foresee that the recipient of his words would take the statement seriously."). The court also reaffirmed that to establish that a defendant's threat is a true threat, the government need not prove that the defendant actually intended to carry out the threat or that he had the ability to do so. *Khorrami*, 895 F.2d at 1192-92; *see also Saunders*, 166 F.3d at 914.

It should be noted that in this case there appears to be no evidence that Parr took any steps to communicate the alleged threat to those charged with maintaining security for Reuss Federal Plaza or anyone who works there. The affidavit filed in support of the complaint suggests that Parr made the threatening statements in the course of a private conversation with his cellmate. In this respect, this case differs from the foregoing cases. In *Watts*, the threat was made in public at a gathering on the grounds of the Washington Monument. And in *Hoffman*, *Khorammi*, and *Saunders*, the alleged threat was contained in a letter or telephone call directed at the target of the threat. Several courts have found the evidence insufficient to establish a

"true threat" when it was not communicated to its intended target.

In *United States v. Fenton*, 30 F. Supp.2d 520 (W.D. Pa. 1998), for example, the court granted the defendant's motion for judgment of acquittal on a charge of threatening a federal official on the ground that the defendant's remark that he was going to shoot Pennsylvania Congressman John Murtha was made during a conversation with an insurance adjuster, who had no connection to Congressman Murtha, and without any request that it be conveyed to the Congressman. Absent evidence of an effort to communicate the alleged threat to its intended target, the court suggested, their could be no "true threat" within the meaning of *Watts*. 30 F. Supp.2d at 524-26 ("Moreover, under the circumstances presented here, no jury could find anything truly 'threatening' in Fenton's remarks because they could not influence Murtha's attitude or behavior in any way when spoken only to Leventry."). *See also United States v. Alkhabaz*, 104 F.3d 1492 (6th Cir. 1997); *United States v. Bellrichard*, 779 F.Supp. 454 (D.Minn.1991), *aff'd*, 994 F.2d 1318 (8th Cir.1993).

However, in *United States v. Stewart*, 420 F.3d 1007, 1016 (9th Cir. 2005), the Ninth Circuit rejected the defendant's argument that to support a conviction under 18 U.S.C. § 115(a)(1)(B), a defendant must communicate the threat directly to the intended target. In *Stewart*, the defendant appealed his convictions for threatening a federal judge, soliciting the murder of a federal judge and making false statements in connection therewith. The charges in *Stewart*, like those in this case, arose out of the defendant's conversations with another

inmate of the prison in which he was serving a sentence. The defendant expressed his desire to kill a federal judge to the other inmate, and even offered him weapons and $100,000 if he arranged to have the murder done. The inmate reported the threat to the FBI, and, also as in this case, the FBI fitted the cooperating inmate with a device that recorded the defendant's threats. On appeal the defendant challenged the sufficiency of the evidence supporting his conviction for threatening a federal judge, claiming that § 115(a)(1)(B) required a defendant to communicate the threat directly to the intended target. 420 F.3d at 1015. Noting that the statutory text contained no such requirement, that its previous cases had suggested there was no such requirement, and that other circuits that had addressed the issue found no such requirement, the Ninth Circuit rejected the defendant's contention:

> We see no reason to insert a requirement into the statute that Congress did not insert itself. Accordingly, we hold that, under 18 U.S.C. § 115(a)(1)(B), a defendant need not communicate the threat directly to the intended target for a conviction under the statute; receipt of the threat only by a third party is sufficient, assuming the First Amendment requirements discussed below are also satisfied.

Id. at 1016. *See also United States v. Martin*, 163 F.3d 1212, 1215-18 (10th Cir.1998) (affirming the defendant's conviction for threatening a law enforcement officer even though the threats were

only heard by the defendant's associate (who recorded the threats and reported them to law enforcement), and holding that the threats did not have to be directed to the target but only had to be received by a third party); *United States v. Raymer*, 876 F.2d 383, 391 (5th Cir.1989) (affirming the defendant's conviction on two counts of threatening a federal probation officer even though the officer never directly received the threats, and holding that actual receipt of the threats by the proposed target was not required under the statute).

I agree with the reasoning of *Stewart* and those decisions that have held that a threat need not be communicated to the intended target in order to constitute a "true threat", and conclude that the same is true under § 2332a. Section 2332a, like § 115, contains no explicit requirement that the threat be communicated to the intended target, nor is such a requirement inherent in the word "threat". The word "threat" means "an expression of intention to inflict evil, injury, or damage." *Merriam-Webster's Collegiate Dictionary* at 1228 (10th ed. 1999). To "threaten" means "to utter threats against." *Id.* Furthermore, unlike § 115(a)(1), § 2332a does not require that the threat be made "with intent to impede, intimidate, or interfere with such official, judge, or law enforcement officer while engaged in the performance of official duties, or with intent to retaliate against such official, judge, or law enforcement officer on account of the performance of official duties." 18 U.S.C. § 115(a)(1). Thus, there is

even a stronger reason to reject the suggestion that such a requirement exists under § 2332a.[7]

In this respect, § 2332a is more analogous to 18 U.S.C. § 871, which prohibits threats against the president without regard to the purpose for which the threat is made, than it is to § 118(a)(1). A threat to blow up a federal building with a weapon of mass destruction raises the same concerns as a threat to the President. Given the potential loss of life and property damage it entails and the fear it engenders, such a threat, if credible, demands the expenditure of significant resources to fully investigate the risk and guard against the danger. Thus, even if false, such a threat results in substantial disruption and harm. And of course, such a threat is entitled to no First Amendment protection, whether the person who utters it intends to act on it or not. One has no more right to utter a credible threat to blow up a federal office building with a weapon of mass destruction, even if he does not mean it, than he has to shout "fire" in the middle of a crowded theater when there is none. See *Schenck v. United States*, 249 U.S. 47, 52 (1919). Both fall within the "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to

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[7] If the defendant takes no steps to communicate the threat to the intended target, it is difficult to see how he could have intended the threat to "impede, intimidate, or interfere" such official while engaged in the performance of official duties, or how he could intend the mere threat, as opposed to the carrying out of the threat, as retaliation against such official. To the extent *Fenton* and the cases upon which it relies are based on the absence of evidence of the specific intent required under § 115(a)(1), the result reached in those cases is consistent with my conclusion here.

raise any Constitutional problem . . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

Based on the foregoing, I conclude that in order to prove its case against Parr, the government will have to establish that (1) Parr threatened the use a weapon of mass destruction (2) to damage a federal building and (3) the threat was a true threat. To constitute a true threat, the government will have to prove that the statement attributed to Parr was made "in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to," *Hoffman*, 806 F.2d at 707, use a weapon of mass destruction to damage the Reuss Federal Plaza. It is not necessary, however, that the government prove that Parr actually intended to use a weapon of mass destruction to damage the building or that he had the capacity to do so. Nor is it necessary that the government show that he communicated the threat to anyone connected with the intended target. With these elements in mind, I now turn to the specific evidence the government seeks to introduce.

III. Government's Proposed Rule 404(b) Evidence

As stated above, the government has given notice of its intent to introduce seven categories of evidence of other crimes, wrongs, or acts in which Parr is alleged to have engaged. Rule 404(b) of the Federal Rules of Evidence governs the admissibility of evidence of other crimes, wrongs, or acts. It states in relevant part:

> (b) Other Crimes, Wrongs, or Acts.-- Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Fed. R. Evid. 404(b). Evidence of other crimes, wrongs or acts is admissible under this rule, if it meets four requirements: "(1) it is directed toward establishing a matter other than the defendant's propensity to commit the crime, (2) the evidence was sufficient to support a jury finding that the defendant committed the similar act, (3) the other act is similar enough and close enough in time to be relevant to the matter in issue, and (4) the probative value is not substantially outweighed by the danger of unfair prejudice." *United States v. Coleman*, 179 F.3d 1056, 1061 (7th Cir. 1999).

With respect to the last requirement, it is important to emphasize that, to be excluded, the probative value of otherwise admissible evidence must be substantially outweighed by the danger of

unfair prejudice. Fed. R. Evid. 403; *United States v. Dunkin*, 438 F.3d 778, 780 (7th Cir. 2006). In addition, other considerations may warrant the exclusion of otherwise relevant evidence, including the fact that is likely to confuse or mislead the jury, or the evidence is cumulative and its admission will result in undue delay or a waste of time. See Fed. R. Evid. 403. Although it is difficult to determine before trial whether the latter considerations will play a role, both the character and the amount of evidence included in the government's proffer suggests that they might.

The government has designated the first category of evidence it proffers as "Parr's Knowledge of Chemicals/Explosives." (Doc. # 39 at 2.) It consists of (a) testimony by several individuals who knew Parr, such as former girlfriends and neighbors, to the effect that Parr had an interest in and apparent knowledge of chemistry; (b) the fact that a copy of a book entitled The *Anarchist Cookbook*, which includes recipes for bomb making, was found by Janesville police when they were executing a search warrant on Parr's home in July of 2001; (c) Parr's statements to CW#1 about having learned to use explosives by reading books such as The *Anarchist Cookbook*; and (d) opinion testimony from a FBI explosives expert that, based on his review of Parr's recorded conversations with CW#1 and the chemistry equations copied from The *Anarchist Cookbook*, Parr was capable of producing a vehicle-borne improvised explosive device that could have caused damage to the federal building, and injury and death to persons in and around it. Category two, which the government describes as "Parr's Actual

and/or Stated Intention to Use Chemical/Explosive Devices", consists of (a) testimony by some of the same people and others to the effect that Parr expressed an interest in explosive devices, and had made or claimed to make several explosive devices in the past; that he liked to blow things up; (b) that he once ordered chemicals where he worked without authorization, that he showed a neighbor a barrel of chemicals "that only farmers were supposed to have"; (c) that he told one person of his knowledge of bomb making, expressed a desire to seek vengeance against the government and told him that the country needed an "enema" and using a bomb was an effective way to make a point; and (d) Parr's statements to CW#1 about how he used or planned to use explosives and incendiary devices. The government recognizes that some of the proffered evidence is either direct or circumstantial evidence of the charged crime and thus is not governed by Rule 404(b). This would obviously include Parr's recorded statements to CW#1 about how he learned to use explosives by reading such books as The Anarchist Cookbook, since such statements are part of and provide the context for evaluating the statements allegedly made by Parr that form the basis of the charge against him.[8] To the extent the proffered evidence does not constitute evidence of the crime

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[8] According to an online encyclopedia, The *Anarchist Cookbook* (ISBN 0-9623032-0-8) was written by William Powell and first published in 1970. It was intended as a protest against the United States government over the Vietnam war and "contains recipes and instructions for the manufacture of explosives, drugs, a number of now obsolete telecommunications hacking devices, and other controversial themes." http://en.wikipedia.org/wiki/The_Anarchist_Cookbook

charged, however, the government contends it is relevant because it demonstrates Parr's interest in and knowledge of explosives, thus making it more likely that he intended, and was capable of, following through on his threat.

Of course, as noted above, the government need not prove that Parr either intended or was capable of following through on his threat. The only elements of the crime are that Parr threatened to use a weapon of mass destruction to damage a federal building and that the threat was a true threat, meaning that it would have appeared credible to a reasonable person in the position of the person to whom it was made. *Hoffman*, 806 F.2d at 707. But the fact that Parr's actual intent and capability are not essential elements of the crime does not mean they are not relevant. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Evidence that Parr actually intended to blow up the Reuss building, that he had been intently studying bomb making for years, and that he had the capability of doing so would make CW#1's testimony that Parr said he intended to do so more credible. It would constitute evidence of a motive for making such a statement, namely, that it was true. It would also assist the jury in deciding whether Parr's statement constituted a "true threat."

With these considerations in mind, it appears that much of the category one and two evidence proffered by the government, though possibly cumulative and subject to exclusion on that basis, is

relevant. Louise Olson, for example, lived with Parr from March to May 2001 and is expected to testify that she saw him with chemicals, including sulfuric and nitric acid, and that he showed her an experiment using chemicals. (Doc. # 39 at 2.) According to the government, Olson would further testify that Parr "talked a lot about building bombs, and that was of great interest to him, and he took a lot of pleasure . . . in explaining how he does this and how he did it." (*Id.* at 4.) Olson is also expected to testify that Parr had a lot of pipe containers in the garage and showed her how to make pipe bombs, that he showed her an island in Rock River where he had blown up trees, and that she heard him ordering explosives on the telephone. (*Id.*)

Olson's proposed testimony demonstrates Parr's knowledge of, and interest in, chemistry and bomb making. Such knowledge and experience is directly relevant to the government's contention that he actually intended to blow up the Reuss Federal Plaza. Thus, it makes CW#1's testimony that Parr told him he intended to do so and that he was serious about it more probably true. It also supports the government's contention that Parr's statement constituted a true threat. The same is true concerning the testimony of Jeanine Pankhurst, who lived with Parr off-and-on from the spring of 1999 until 2001. Pankhurst, according to the government's proffer, will testify that Parr possessed chemistry books and thought himself to be a chemist. Parr also had chemicals and black powder, and Pankhurst saw him making pipe bombs. Pankhurst also claims to have been with Parr when he exploded a pipe bomb on an island in the Rock River. (*Id.* at 2,

4.) The fact that Parr knew how to make bombs and had done so before supports the government's theory of the case that he actually intended to blow up the Reuss Federal Plaza.

I also conclude that the probative value of this evidence is not substantially outweighed by the danger of unfair prejudice. Although the manufacture and possession of an explosive device is a crime under Wisconsin law, see Wis. Stat. § 941.31, simple possession, by itself, is not so serious that jurors are likely to be unduly influenced by evidence that Parr had an interest in explosives and manufactured pipe bombs. The question would be closer if the evidence was that Parr had previously used explosives to injure another person. But since that is not the case and the evidence is offered merely to show Parr's knowledge, I do not find it unduly prejudicial. A curative instruction advising the jurors of the limited purpose for which they may consider the evidence, should be sufficient to protect Parr from any danger that the jury will misuse such evidence.

Of course, this is not to say the evidence is not damaging to Parr; it is certainly damaging to his case to the extent that it supports the government's theory that Parr actually intended to blow up the Reuss Federal Plaza and was capable of doing so. But the government is entitled to show that Parr's threat was more than a hoax. Insofar as its evidence establishes that fact, it is not unfairly prejudicial, and it is unfair prejudice that the rule is intended to prevent. *See United States v. Foster*, 939 F.2d 445, 456 (7th Cir. 1991) ("All evidence offered by the

prosecutor is prejudicial to the defendant; there would be no point in offering it if it were not.").

Evidence that Janesville police found a copy of *The Anarchist Cookbook* and a notebook with handwritten chemistry equations when they executed a search warrant on Parr's home in 2001 will also be allowed. This fact corroborates CW#1's statement that Parr told him he learned about explosives from that particular source and, insofar as it contains recipes for bomb making, also makes more likely the government's contention that Parr's statement was a true threat. Whether any portions of the book will be admitted is discussed below, but the mere fact that he had a copy of the book is clearly relevant and not unduly prejudicial.

Likewise, opinion testimony from the FBI explosives expert that Parr was capable of building an explosive device that would have caused damage to the Reuss Federal Plaza, assuming a proper foundation is laid, will also be allowed. Although the test for whether a statement constitutes a "true threat" is what a reasonable person in the position of the person to whom the statement was made would believe, evidence that what Parr said he would do would actually accomplish the threatened end is relevant to that determination. In the absence of such evidence, Parr's attorney would be free to argue to the jury, the members of which will most likely be totally ignorant of the art of bomb making, that no reasonable person would take Parr's statement seriously. Evidence that what Parr said he would do could have achieved the result he said he intended bears directly on this issue.

The remaining evidence in categories one and two, however, is for the most part either irrelevant, cumulative or too prejudicial to warrant admission. The proposed testimony of James Tiedeman, who met Parr in the fall of 2002 at a thirty-day drug rehabilitation program, that Parr liked to be called "the chemist" is cumulative and risks causing unfair prejudice by introducing the fact that Parr was in a drug rehabilitation program. Given its marginal relevance and the existence of the previously described evidence of Parr's knowledge of chemistry and explosive devices, Tiedeman's testimony will not be allowed.

The same is true of the proposed testimony of Chad Olm, who met Parr in prison in June 2003. Olm is expected to testify that he lied to Parr and told him that he was serving time for operating a methamphetamine laboratory, but thought Parr would discover his lie because of Parr's extensive knowledge of chemistry. (Doc. # 39 at 3.) On this issue, I agree with Magistrate Judge Gorence's conclusion that Olm's lay opinion of Parr's understanding of chemistry lacks a proper foundation. (Dec. and Order at 7.) It is also cumulative. However, Olm's statement that Parr expressed a desire to seek vengeance on the government and stated that a bomb would be an effective way to make the point (Doc. # 39 at 6) is relevant to motive and intent, and will therefore be allowed unless cumulative.[9]

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[9] This assumes also that Parr actually made such statements and Olm is not simply stating his opinion as to what Parr thought. The government's proffer is less than clear on the

The government wants to offer testimony from Nola Cornelison, a former neighbor of Parr, that between 1999 and 2001, Parr boasted that he had enough explosives in his basement and garage to "blow the whole place" up and that Parr had big round barrels in his garage and basement. (Doc. # 39 at 5.) Ron Buss, Parr's boss at Custom Granular for approximately one year about five or six years ago, would testify that Parr ordered a small amount of chemicals (he does not recall what chemicals) once with permission and once without. (*Id.*) Jeremiah Buss, Parr's immediate supervisor at Custom Granular, would testify that Parr liked to "make things blow up." (*Id.*) Gina Rae Castro, who was in a relationship with Parr from 1989 to 1993, told the FBI that she saw Parr detonate an improvised bomb using a plastic bottle and that the rear wall of her residence started on fire in 1993 or 1994. The government contends that the latter statement corroborates a statement Parr made to CW#1 that was recorded in which he admitted to starting a fire at an ex-girlfriend's house. (*Id.*) Elizabeth Wuensch-Byrd, another neighbor who lived next to Parr between early 1998 and 2001, would testify that Parr said he liked to make bombs and showed her a barrel that he said contained chemicals that only farmers were supposed to have. (*Id.*)

Ms. Cornelison's testimony that Parr claimed to have enough explosives to blow up the place corroborates the testimony of Ms. Olson and Pankhurst that Parr was interested in and knowledgeable about explosives. The same is true of

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point.

Ms. Wuensch-Byrd's proffered testimony that Parr told her he liked to make bombs. Assuming it is not cumulative, this testimony will be allowed. The proposed testimony of Ms. Cornelison and Wuensch-Byrd about the presence of barrels in Parr's basement and garage is also relevant to Parr's intent in light of his statement to CW#1 about the use of fifty-five gallon drums in constructing an explosive device. (Doc. #1 ¶ 21.) However, Ron Buss' proposed testimony that some five or six years ago Parr ordered unknown chemicals on two occasions, once without authority, is too remote, irrelevant and unduly prejudicial in that it suggests he acted without his employer's permission. Jeremiah Buss' statement that Parr liked to blow things up is also remote and appears to lack any foundation. Ms. Castro's proffered testimony is too remote in time, going back more than ten years, and evidence that Parr committed the crime of arson is inadmissible propensity evidence, irrelevant to any issue in the case. Thus, neither of the Busses' testimony, nor that of Ms. Castro will be allowed.

The third category of proffered evidence, entitled "Possession of Chemical/Bomb Making Books and Paraphernalia," consists of items allegedly belonging to Parr that were turned over to or seized by law enforcement officers in the course of their investigation. They include the aforementioned *Anarchist Cookbook*; *The Terrorist Handbook*; a chemistry textbook; the *Merck Index, an Encyclopedia of Chemicals, Drugs and Biologicals;* a notebook with chemistry equations, including "Mustard Gas"; various army counterintelligence, terrorism counter action and urban guerilla

manuals; and various books bearing the titles *Fighting In The Streets, A Manual of Urban Guerilla Warfare*; *The Outlaw's Bible*; *The Black Book of Revenge*; *The Complete Manual of Hard-Core Dirty Tricks and Schemes*; *The Handy Physics Answer Book*; *The Addison-Wesley Science Handbook for Students, Writers and Science Buffs*; and *The Handy Science Answer Book*. (Doc. # 39 at 6-7.)

The Magistrate Judge concluded that the books relating to chemistry, science, physics, and the laboratory supply book are probative of Parr's knowledge of chemistry and explosives, his preparation and intent, and would therefore be admissible. (Dec. & Order at 16.) As to *The Anarchist Cookbook*, the Magistrate Judge ruled that only those portions which are probative of the charged crime would be admissible. Such items are probative to the extent they demonstrate Parr's knowledge of chemistry and explosives. As to the remaining items, including the Army counterintelligence, terrorism counter action, and urban guerilla manuals; *Fighting In The Streets: A Manual of Urban Guerilla Warfare*; the *Outlaw's Bible*; *The Black Book of Revenge*; and *The Complete Manual of Hard-Core Dirty Tricks and Schemes*, however, the Magistrate Judge ruled that, given their violent and seditious quality, they would not be admissible. Whatever probative value they might have, the Magistrate Judge concluded, was substantially outweighed by the danger of unfair prejudice.

I agree with the Magistrate Judge's analysis and adopt it as my own, at least as the record now stands. None of the books the Magistrate Judge

found unfairly prejudicial are before me, but from their titles it appears that each has a violent and seditious theme. To the extent Parr actually held such views and expressed them himself, his own statements are admissible to show his motive for threatening to use a weapon of mass destruction to blow up a federal building. But mere possession of books containing such a theme is not evidence that the possessor holds such views himself. More importantly, there is a real danger ascribing the views expressed in any book to a person who owns it. For this reason, courts have refused to adopt as a general rule the idea that "the government may use a person's reading habits, literary tastes, or political views as evidence against him in a criminal prosecution." *United States v. Giese*, 597 F.2d 1170, 1185 (9th Cir. 1979). In *United States v. McCrea*, 583 F.2d 1083 (9th Cir. 1978), the court held that evidence that police had seized two books entitled *Improvised Munitions Handbook* and *OSS Sabotage & Demolition Manual* in the course of executing a search warrant on the defendant's home was improperly admitted at the defendant's trial on a charge of possession of the unregistered destructive device. In so ruling, the court noted that "[t]hese titles alone would have the tendency to prejudice the defendant . . . [and] . . . it was entirely unnecessary to support the charge." *McCrea*, 583 F.2d at 1086.

More recently, the Seventh Circuit addressed the admissibility of *The Anarchist Cookbook* in *United States v. Rogers*, 270 F.3d 1076 (7th Cir. 2001). In Rogers, the defendant was charged with possession of an unregistered firearm after a home-made silencer for a MAC-11 semiautomatic pistol

was found in his garage. Also found at the defendant's residence was a copy of *The Anarchist Cookbook*, which contains instructions on how to construct a silencer. In a contemporaneous interview, the defendant had purportedly admitted he used the book to construct the silencer, but later claimed he purchased it as part of a kit and had no idea of its function. *Id.* at 1080-81. *The Anarchist Cookbook* was introduced at trial and the prosecutor was allowed to read to the jury some passages in addition to those about building silencers. Rogers' trial lawyer did not object, but on appeal Rogers claimed that this use was plain error. The Seventh Circuit agreed that error had occurred but found it did not warrant reversal:

> In some respects error occurred: The book's title may have been distracting (and was misleading: it is not about classical anarchism or about the culinary arts), and the prosecutor should have been limited to using those portions of the book pertinent to the charge. There is no problem, under either the law of evidence or the first amendment, in presenting to the jury written material in the defendant's possession that shows how to commit the crime, for this makes it more likely that the defendant rather than someone else was culpable. *Dressler v. McCaughtry*, 238 F.3d 908 (7th Cir.2001). At trial Rogers contended that he had purchased the MAC-11 as part of a kit from someone who told him

> that the tube was an "extension" and that he had no idea that the device's function was to quiet the gun's report. Whether that is true or whether, instead, Rogers made the silencer himself knowing full well what the device did, was a subject on which some contents of The Anarchist's Cookbook were probative. But the judge had an obligation to keep the prosecutor from suggesting that Rogers should be convicted because he owned seditious literature, that anyone who would read a book called The Anarchist's Cookbook must hold his legal obligations in contempt, or that possession of the book implied that Rogers wanted to become a sniper.

Id. at 1081.

Based on the foregoing, I therefore conclude that those books bearing titles suggesting violent and seditious themes are not admissible. The determination of what, if any, portion of the contents of The Anarchist Cookbook will be allowed will depend on a specific showing of relevance at trial. Absent further ruling by the court, the specific contents will not be introduced.

The government's fourth category of proffered evidence consists of evidence of threats Parr allegedly made against others. It includes Ms. Olson's proposed testimony that Parr threatened to kill her and blow up her house if she returned to her husband; that he told her he had killed someone who

had pressed charges against him and tossed the body in the river and; that he had a hit list and planned on killing one person for every year he served in jail. (Doc. # 39 at 8.) The government also offers Ms. Pankhurst's testimony that Parr said he would blow up her car if she left him, and similar comments and threats recounted by Ms. Cornelison, Ms. Castro and Helen Homan, who lived with Ms. Cornelison for a period of time. Some of the statements attributed to Parr reflect his alleged anger toward, and hatred of, the government. In addition, the government intends to introduce the following writings that were taken from Parr's property at Oshkosh Correctional Institution:

> -"gov. makes me angry."
>
> -"I'm sorry for scaring you into staying with me
>
> that I put a gun to your head
>
> I threatened you, your family
>
> I broke up you [sic] dysfunctional family
>
> I wouldn't let go";
>
> -"the success of any given operation is directly proportional to the procurement of accurate and reliabe [sic] information relating to the opposing force;"
>
> -"the success of any given operation is dependent upon the accurate and reliable information about the enemy."

(*Id.* at 8.) Category five of the government's proffer concerns an alleged plan by Parr to blow up the Rock County Courthouse. The government intends to introduce evidence of such a plan through the testimony of Ms. Olson, who is expected to testify that Parr had "severe animosity" for the Rock County district attorney, sheriff's department and judges and talked of driving a car filled with explosives into the underground parking garage and blowing up the courthouse in an effort to kill those involved in his prosecution and conviction. (*Id.* at 9.)

The Magistrate Judge ordered that all of the foregoing evidence, with the exception of statements attributed to Parr expressing his anger and hatred for the government and the plan to blow up the Rock County Courthouse, be excluded. (Dec and Order at 18-20.) I agree, except that I conclude that the alleged plan to blow up the Rock County Courthouse should also be excluded. Parr's own statements expressing his anger and hatred for the government are evidence of his motive and, unless unduly cumulative or remote in time, will be allowed. The remaining evidence, however, constitutes propensity evidence and is apparently offered for no other purpose than to show that Parr is a dangerous person. It is clearly not admissible for that purpose. See Fed. R. Evid. 404(a) ("Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion . . . .").

In its Objections To Magistrate Judge's Decision and Order On Rule 404(b) Material, the government suggests that such evidence may be properly admissible if the defense is allowed to

introduce evidence of Parr's mental state. Although Parr has not given notice of an insanity defense under Fed. R. Crim. P. 12.2, the government states he has indicated his intent to place his mental state at issue. (Doc. # 119 at 5-6.) If he is allowed to do so, the government contends this will open the door to evidence it seeks to introduce concerning prior threats to girlfriends, including arson and physical abuse. (*Id.* at 10.)

It is difficult to see how such evidence will become relevant, even if Parr denies any intent to threaten. As is usually the case with pretrial evidentiary rulings, the uncertainty over what will actually occur at trial makes any ruling the court makes a tentative one at best. It should go without saying that in the event evidence ruled inadmissible before trial becomes relevant as a result of unforeseen evidence received or new arguments made at trial, either party may request the court to reconsider its pretrial ruling. As the record appears now, however, I conclude that all of the evidence in categories four and five, with the exception of Parr's own statements concerning his feelings toward the government, are either not relevant at all or have such marginal relevance that their probative value is substantially outweighed by the danger of unfair prejudice.

Category six evidence proffered by the government consists of statements by Parr concerning his desire to emulate Timothy McVeigh and the "Unabomber". In addition to statements by Parr, the government seeks to introduce handwritten notes that state "I am angry, vengeful, loving, possessive, resentful, perfectionist," a Uni-"bomb"

drawing, and a tattoo on Parr's arm with the letters "Uni" followed by a depiction of a bomb. (Doc. # 39 at 9-10.) Parr's general description of himself as an "angry, vengeful, loving, possessive, resentful, perfectionist" is not relevant and will not be allowed. His more specific statements expressing his hatred of the government and his admiration and desire to emulate Timothy McVeigh and the "Unabomber", however, are relevant to the issue of motive. It appears that several of the statements the government seeks to introduce were made directly to CW#1 and thus provide part of the context for evaluating whether his statements constitute a "true threat." In truth, the amount of type of evidence the government has proffered on this issue suggests Parr may have been obsessed with one or both of these notorious individuals. Here also, however, there is a danger that some of the evidence the government has included in its notice will appear cumulative and it may be excluded on that basis.

Finally, category seven of the government's proffer consists of evidence of actual physical harm that Parr allegedly caused others in the past. It consists of testimony from Ms. Olson and Pankhurst that Parr was violent and threatening toward them. No explanation is given as to what legitimate purpose the admission of such evidence would serve. I agree with the Magistrate Judge that this evidence has no relevance and must be excluded.

Accordingly and for the reasons set forth above, the defendant's motion to exclude the government's proposed Rule 404(b) evidence is granted in part and denied in part. Absent further ruling by the court, the parties are to refrain from

offering evidence or argument before the jury on the matters excluded above.

SO ORDERED this 12th day of April, 2006.

s/ William C. Griesbach
WILLIAM C. GRIESBACH
United States District Judge

18 U.S.C. § 2332a

Use of weapons of mass destruction

(a) Offense against a national of the United States or within the United States.—A person who, without lawful authority, uses, threatens, or attempts or conspires to use, a weapon of mass destruction—

(1) against a national of the United States while such national is outside of the United States;

(2) against any person or property within the United States, and

(A) the mail or any facility of interstate or foreign commerce is used in furtherance of the offense;

(B) such property is used in interstate or foreign commerce or in an activity that affects interstate or foreign commerce;

(C) any perpetrator travels in or causes another to travel in interstate or foreign commerce in furtherance of the offense; or

(D) the offense, or the results of the offense, affect interstate or foreign commerce, or, in the case of a threat, attempt, or conspiracy, would have affected interstate or foreign commerce;

(3) against any property that is owned, leased or used by the United States or by any department or

agency of the United States, whether the property is within or outside of the United States; or

(4) against any property within the United States that is owned, leased, or used by a foreign government,

shall be imprisoned for any term of years or for life, and if death results, shall be punished by death or imprisoned for any term of years or for life.

(b) Offense by national of the United States outside of the United States.—Any national of the United States who, without lawful authority, uses, or threatens, attempts, or conspires to use, a weapon of mass destruction outside of the United States shall be imprisoned for any term of years or for life, and if death results, shall be punished by death, or by imprisonment for any term of years or for life.

(c) Definitions.—For purposes of this section—

(1) the term "national of the United States" has the meaning given in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22));

(2) the term "weapon of mass destruction" means—

(A) any destructive device as defined in section 921 of this title;

(B) any weapon that is designed or intended to cause death or serious bodily injury through the release, dissemination, or impact of toxic or poisonous chemicals, or their precursors;

(C) any weapon involving a biological agent,

toxin, or vector (as those terms are defined in section 178 of this title); or

(D) any weapon that is designed to release radiation or radioactivity at a level dangerous to human life; and

(3) the term "property" includes all real and personal property.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

Steven J. PARR,

Defendant.

No. 04-CR-235.

April 27, 2006.

JURY INSTRUCTIONS

PART I - Evaluating the Evidence

1.01 FUNCTIONS OF THE COURT AND JURY

Members of the jury, you have seen and heard all the evidence and are about to hear the arguments of the attorneys. Now I will instruct you on the law. You have two duties as a jury. Your first duty is to decide the facts from the evidence in the case. This is your job, and yours alone.

Your second duty is to apply the law that I give you to the facts. You must follow these instructions, even if you disagree with them. Each of the instructions is important, and you must follow them.

Perform these duties fairly and impartially. Do not allow sympathy, prejudice, fear or public opinion to influence you. You should not be influenced by any person's race, color, religion, national ancestry or sex.

Nothing I say now, and nothing I said or did during the trial, is meant to indicate any opinion on my part about what the facts are or about what your verdict should be.

1.02 THE EVIDENCE

The evidence consists of the testimony of witnesses, the exhibits admitted in evidence, and stipulations.

A stipulation is an agreement between both sides that certain facts are true or that a person would have given certain testimony.

1.03 TESTIMONTY OF WITNESSES (DECIDING WHAT TO BELIEVE)

You are to decide whether the testimony of each of the witnesses is truthful and accurate, in part or in whole, or not at all, as well as what weight, if any, you give to the testimony of each witness.

In evaluating the testimony of any witness, you may consider, among other things:

-the witness's intelligence

-the ability and opportunity the witness had to see, hear, or know the things that the witness testified about;

-the witness's memory;

-any interest, bias, or prejudice the witness may have;

-the manner of the witness while testifying; and

-the reasonableness of the witness's testimony in light of all the evidence in the case

You should judge the defendant's testimony in the same way you judge the testimony of any other witness.

GOVERNMENT INFORMANT

There has been evidence introduced at trial that the government used an informant in this case. There is nothing improper in the government's use of the informant and, indeed, certain criminal conduct never would be detected without the use of informants. You therefore should not concern yourselves with how you may personally feel about informants because that is really beside the point. Put another way, you are to decide whether the government has provided beyond a reasonable doubt that the defendant the defendant is guilty of the crime charged in the indictment, regardless of whether the evidence was obtained through the use of the informant.

On the other hand, an informant's testimony must be examined with great caution and care. You should consider, in addition to the other factors set forth above, whether the informant received any benefits or promises from the government in return

for his cooperation and, if so, whether it may have affected his testimony in this case.

1.04 WEIGHING THE EVIDENCE – INFERENCES

You should use common sense in weighing the evidence and consider in light of your own observations in life.

In our lives, we often look at one fact and conclude from it that another facts exist. In law we call this "inference." A jury is allowed to make reasonable inferences. Any inference you make must be reasonable and based on the evidence in the case.

1.05 DEFINITION OF "DIRECT" AND "CIRCUMSTANCIAL" EVIDENCE

Some of you have heard the phrases "circumstantial evidence" and "direct evidence." Direct evidence is the testimony of someone who claims to have personal knowledge of the commission of the crime which has been charged, such as an eyewitness. Circumstantial evidence is the proof of a series of facts which tend to show whether the defendant is guilty or not guilty. The law makes no distinction between the weight to be given either to direct or circumstantial evidence. You should decide how much weight to give any evidence. All the evidence in the case, including the circumstantial evidence, should be considered by you in reaching your verdict.

1.06 WHAT IS NOT EVIDENCE

Certain things are not evidence. I will list them for you:

First, testimony and exhibits that I struck from the record, or that I told you to disregard, are not evidence and must not be considered.

Second, anything that you may have seen or heard outside the courtroom is not evidence and must be disregarded.

Third, questions and objections by the lawyers are not evidence. Attorneys have a duty to object when they believe a question is improper. You should not be influenced by any objection or by my ruling on it.

Fourth, the lawyer's statements to you are not evidence. The purpose of these statements is to discuss the issues and the evidence. If the evidence as you remember it differs from what the lawyers said, your memory is what counts.

Fifth, your notes are not evidence. The purpose is to assist the juror who took the notes in refreshing his or her recollection. If the evidence, as you remember it, differs from another juror's notes, your memory is what counts.

1.07 ATTORNEY INTERVIEWING WITNESS

It is proper for an attorney to interview any witness in preparation for trial.

1.09 NUMBER OF WITNESSES

You may find the testimony of one witness or a few witnesses more persuasive than the testimony of

a large number. You need not accept the testimony of the larger number of witnesses.

3.04 PROOF OF OTHER CRIMES OR ACTS.

You have heard evidence of the acts of the defendant other than those charged in the indictment. For example, you have heard evidence that the defendant was previously convicted for the crime of delivery of marijuana. This evidence was admitted so that you would know why the defendant was in prison and so that you may consider it in the connection with your assessment of his credibility. A conviction of another crime is not evidence of the defendant's guilt of any crime for which the defendant is now charged. You also heard evidence that the defendant may have constructed explosive devices in the past. If you find such evidence credible, you may consider this evidence only on the question of knowledge and intent. You should consider this evidence only for these limited purposes.

CAUTIONARY INSTRUCTION

The defendant is not on trial and may not be convicted for his political views. It is not a crime for a person to either hold or express negative views about the government of the United States or any state or agency thereof. Nor is it a crime to express admiration for individuals such as Timothy McVeigh or Theodore Kazinski or to possess and read books with subversive themes. The defendant's right to hold and express such views, and to possess and read such books is protected by the First Amendment to the United States Constitution. This evidence may

be considered by you solely as it may bear on the defendant's motive, knowledge and intent in connection with the crime charged in the indictment. You must not consider it for any other purpose, and you must not find the defendant guilty because he held or expressed unpopular views.

3.07 WEIGHING EXPERT TESTIMONY

You have heard a witness give opinions about matters requiring special knowledge or skill. You should judge this testimony in the same way you judge the testimony of any other witness. The fact that such a person has given an opinion does not mean that you are required to accept it. Give the testimony whatever weight you think it deserves, considering the reasons given for the opinion, the witness' qualifications, and all the other evidence in the case.

3.09 PRIOR INCONSISTENT STATEMENTS-WITNESSES

You have heard evidence that before the trial witnesses made statements that may be inconsistent with the witnesses's testimony here in court. If you find that it is inconsistent, you may consider the earlier statement only in deciding the truthfulness and accuracy of that witness's testimony in this trial. You may not use it as evidence of the truth of the matters contained in that prior statement. If that statement was made under oath, you may also consider it as evidence of the truth of the matters contained in that prior statement.

3.11 IMPEACHMENT OF WITNESS-CONVICTIONS

You have heard evidence that a witness has been convicted of a crime. You may consider this evidence only in deciding whether that witness's testimony is truthful in whole, in part, or not at all. You may not consider it for any other purpose.

3.17 RECORDING/TRANSCRIPTS OF RECORDING

You have heard recorded conversation. These recorded conversations are proper evidence and you may consider them, just as any other evidence.

When the recordings were played during the trial, you were furnished transcripts of the recorded conversations prepared by the government agents.

The recordings are the evidence, and the transcripts were provided to you only as a guide to help you follow as you listen to the recordings. The transcripts are not evidence of what was actually said or who said it. It is up to you to decide whether the transcripts correctly reflect what was said and who said it. If you noticed any difference between what you heard on the recordings and what you read in the transcripts, you must rely on what you heard, not what you read. And if after careful listening, you could not hear or understand certain parts of the recordings, you must ignore the transcripts as far as those parts are concerned.

DISCREPENCIES IN TESTIMONY

Inconsistencies or discrepancies in the testimony of a witness or between the testimony of different witnesses may or may not cause you to discredit such testimony. Two or more persons

witnessing an incident or a transaction may see or hear it differently. Innocent misrecollection, like failure of recollect, is not an uncommon human experience. In weighing the evidence of a discrepancy, however, always consider whether it pertains to a matter of importance or an unimportant detail and consider whether the discrepancy results from innocent error or from intentional falsehood.

After making your own judgment or assessment concerning the believability of a witness, you can then attach such importance or weight to that testimony, if any, that you feel it deserves.

PART II-CHARGE-INDICTMENT

2.01 THE CHARGE-INDICTMENT

The indictment in this case in the formal method of accusing a defendant of an offense and placing a defendant on trial. It is not evidence against a defendant and does not create an inference of guilt.

The indictment alleges that Defendant Steven Parr threatened to use a weapon of mass destruction against property leased and used by the United States and departments and agencies of the United States. The indictment reads in full as follows:

[Read Indictment]

The defendant has pleaded not guilty to the charge.

2.03 PRESUMPTION OF INNOCENCE-BURDEN OF PROOF

The defendant is presumed to be innocent of the charge. This presumption continues during every stage of the trial and your deliberations on the verdict. It is not overcome unless from all the evidence in the case you are convinced beyond a reasonable doubt that the defendant is guilty as charged. The government has the burden of proving guilt of the defendant beyond a reasonable doubt.

4.01 ELEMENTS OF THE OFFENSE

To sustain the charge in the indictment, the government must prove the following propositions:

First, that the defendant threatened to use a weapon of mass destruction;

Second, that the threat was against property owned, leased or used by the United States or any of its departments or agencies; and

Third, that the threat was a true threat

The term "weapon of mass destruction" means a destructive device, such as an explosive or bomb.

A threat is an expression of an intention to inflict evil, injury, or damage. To "threaten" means to utter threats against.

To constitute a true threat, you must find that the statement attributed to the defendant was made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker

communicates the statement as a serious expression of an intention to use a weapon of mass destruction to damage Reuss Federal Plaza. You must also be satisfied that the defendant intended his statement to be understood in that manner. A "true threat" is a serious statement expressing an intention to do an act which under the circumstances would cause apprehension in a reasonable person, as distinguished from idle or careless talk, exaggeration, or something said in a careless manner. To constitute a true threat, however, it is not necessary that the defendant actually intended to use a weapon of mass destruction to damage the building or that he had the capacity to do so. Nor is it required that he communicated the threat to anyone connected with the Reuss Federal Plaza

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other had, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty

4.04 DATE OF CRIME CHARGED

The indictment charges that the offense was committed "on or about" certain dates. The government must prove that the offense happened reasonable close to those dates but is not required to prove the alleged offense happened on those exact dates

PUNISHMENT

The punishment provided by law for the offense charged in the indictment is a matter exclusively within the province of the court and should not be considered by you in any way in arriving at the verdict.

[CLOSING ARGUMENTS]

PART III – PROCEDURE FOR JURY DELIBERATION

7.01 SELECTION OF FOREPERSON – GENERAL VERDICT

Upon retiring to the jury room, select one of your number as your foreperson. The foreperson will preside over your deliberations and will be your representative here in court.

Two forms of verdict have been prepared for you as to charge against the defendant.

[form of verdicts read]

Take these forms to the jury room, and when you have reached unanimous agreement on your verdict, your foreperson will fill in, date, and sign the form of verdict form of verdict upon which you agree.

7.06 DISAGREEMENT AMONG JURORS

The verdict must represent the considered judgment of each juror your verdict, whether it be guilty or not guilty, must be unanimous.

You should make every reasonable effort to reach a verdict. In doing so, you should consult with one another, express your own views, and listen to the opinions of your fellow jurors. Discuss your differences with an open mind. Do not hesitate to re-examine your own views and change your opinion if you come to believe it is wrong. But you should not surrender your honest beliefs about the weight or effect of evidence solely because of the opinions of your fellow jurors or for the purposes of returning a unanimous verdict.

The twelve of you should give fair and equal consideration to all the evidence and deliberate with the goal of reaching an agreement which is consistent with the individual judgment of each juror.

You are impartial judges of the facts. Your sole interest is to determine whether the government has proved its case beyond a reasonable doubt.

7.05 COMMUNICATION WITH COURT

I do not anticipate that you will need to communicate with me. If you do, however, the only proper way is in writing, signed by the foreperson, or if he or she is unwilling to do so, by some other juror, and given to the bailiff.

COMMUNICATION WITH OTHERS

You will note from the oath about to be taken by the bailiff that he too, as well as any other person, is forbidden to communicate in any way or manner with any member of the jury concerning the evidence, your opinions, or the deliberations.

Bear in mind also that you are never to reveal to any person—not even to the court—how the jury stands, numerically or otherwise, on the question of whether or not the government has sustained its burden of proof until after you have reached a unanimous verdict.

CLOSING

Now, members of the jury, the duties of counsel and the court have been performed. The court has instructed you regarding the rules of law which should govern you in your deliberations. The time has now come when the great burden of reaching a just, fair, and conscientious decision of this case is to be thrown wholly upon you, the jurors selected for this important duty. You will not be swayed by sympathy, prejudice, or passion. You will be very careful and deliberate in weighing the evidence. I charge you to keep your duty steadfastly in mind and, as upright citizens, to render a just and true verdict.

No. 08-757

In the Supreme Court of the United States

STEVEN J. PARR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a conviction for threatening to use a weapon of mass destruction against a federal government building, in violation of 18 U.S.C. 2332a(a)(3) (2000 & Supp. III 2003), requires proof that a reasonable person would regard the communication as threatening, or instead requires proof that the defendant intended for the communication to be taken as threatening.

2. Whether evidence that is probative of the defendant's intent is admissible, even if the listener were unaware of the information.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 545 F.3d 491.

JURISDICTION

The judgment of the court of appeals was entered on September 18, 2008. The petition for a writ of certiorari was filed on December 10, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Wisconsin, petitioner was convicted of threatening to use a weapon of mass destruction against property leased and used by departments and agencies of the United States, in violation of

18 U.S.C. 2332a (2000 & Supp. III 2003). He was sentenced to 120 months of imprisonment, to be followed by five years of supervised release. The court of appeals affirmed petitioner's conviction, but vacated his sentence and remanded for resentencing. Pet. App. 1a-28a, 48a; Pet. C.A. Br. App. 3.

1. In the summer of 2004, while petitioner was incarcerated in a Wisconsin prison, his cellmate John Schultz wrote to the FBI warning that petitioner repeatedly threatened to blow up a federal building in Milwaukee. The letter indicated that petitioner was due to be released soon and that petitioner should be taken seriously because he knew about making bombs and was a devotee of Timothy McVeigh. The FBI's preliminary investigation confirmed some of Schultz's information. Pet. App. 3a.

The day before petitioner was to be released, Schultz secretly recorded a conversation with petitioner. Petitioner expounded on his hatred of the government and described his past experiences with making and detonating explosives. He admitted that he burned down an ex-girlfriend's house using napalm and that he constructed a bomb hidden in a cosmetics container that he initially intended to use to disfigure another ex-girlfriend. The two men also engaged in a technical discussion of bomb-making components. Pet. App. 3a-5a.

Petitioner described his detailed plan to blow up the Reuss Federal Plaza in Milwaukee. Pet. App. 4a-5a. He explained that he chose the Reuss building because it was a predominantly glass structure located close to the street and that bombing a federal building in "down-home America" would "make a wonderful statement." *Id.* at 5a. The plan involved parking a delivery truck containing the device outside the building as if he were

making a delivery. He would then briefly enter the building, dressed in clothing that would appear similar to a delivery service uniform, and escape quickly before the bomb detonated. Although he did not specify when he would carry out his plan, he intended to spend the eight years of his probation refining his technique and assured Schultz that he "absolutely" intended to follow through with the bombing within ten years. *Id.* at 5a-6a; Pet. C.A. App. Tab 7, at 87-94.

The next day, petitioner was released from prison to a halfway house, and FBI agents arrested him. During an interview with the agents, he denied making verbal threats to blow up the Reuss Federal Plaza. Pet. App. 6a.

2. Petitioner was charged with threatening to use a weapon of mass destruction against a federal building, in violation of 18 U.S.C. 2332a (2000 & Supp. III 2003). At trial, Schultz described his discussions with petitioner, and the jury heard the recorded conversation. Schultz testified that he took petitioner's threats seriously. Pet. App. 1a, 6a-7a.

Three of petitioner's ex-girlfriends and two of his former neighbors testified to petitioner's hatred of the government and his admiration for domestic terrorists, including Timothy McVeigh and Theodore Kaczynski. Petitioner's nickname was "Uni," a reference to the Unabomber. The testimony revealed petitioner's obsession with bomb making, experience with explosives (including the construction of about a dozen pipe bombs), prior threats to blow up buildings, and possession of chemicals. An expert witness testified that petitioner would have been capable of carrying out his threat. The government also introduced books and notebooks found in petitioner's possession at the time of his earlier arrest

for drug distribution that contained detailed explanations of how to construct various explosive devices. Petitioner's collection included *The Anarchist Cookbook*, a 1970s handbook that contained instructions for conducting a myriad of illegal activities, including manufacturing explosives. Pet. App. 6a-8a, 12a.

Petitioner testified in his own defense. He did not deny the statements in the recording but claimed that he had been joking. Pet. App. 6a.

Petitioner requested that the court instruct the jury that it had to find that he "actually intended to threaten to use a weapon of mass destruction." Pet. Proposed Substantive Jury Instruction 2. Accordingly, in instructing the jury that it had to find that the "threat was a true threat," Pet. App. 97a, the court defined "true threat" as follows:

> To constitute a true threat, you must find that the statement attributed to the defendant was made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to use a weapon of mass destruction to damage Reuss Federal Plaza. *You must also be satisfied that the defendant intended his statement to be understood in that manner.* A "true threat" is a serious statement expressing an intention to do an act which under the circumstances would cause apprehension in a reasonable person, as distinguished from idle or careless talk, exaggeration, or something said in a careless manner. To constitute a true threat, however, it is not necessary that the defendant actually intended to use a weapon of mass destruction to damage the building or that he had the

> capacity to do so. Nor it is required that he communicated the threat to anyone connected with the Reuss Federal Plaza.

Id. at 97a-98a (emphasis added). The jury found petitioner guilty. *Id.* at 8a. After calculating an advisory Sentencing Guidelines range of 360 months to life imprisonment, the district court sentenced petitioner to 120 months of imprisonment. *Ibid.*

3. The court of appeals affirmed petitioner's conviction, but remanded for resentencing. Pet. App. 1a-28a. As relevant here, the court first observed that "[a] statement qualifies as a 'true threat,' unprotected by the First Amendment, if it is 'a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.'" *Id.* at 9a (quoting *Virginia* v. *Black*, 538 U.S. 343, 359 (2003)). Because petitioner "explicitly disclaimed" any challenge to the jury instruction on the definition of "true threat," *id.* at 10a, the court construed his claim as a challenge to the sufficiency of the evidence, *ibid.* The court held that "abundant" evidence supported the jury's finding that petitioner's threats were "true threats" as defined by the district court. *Ibid.*

The court also concluded that, with the exception of *The Anarchist Cookbook*, the evidence about petitioner's interest in and past use of explosives, as well as the expert testimony about petitioner's ability to carry out his threat, was properly admitted as probative of petitioner's intent. Pet. App. 13a, 20a-21a. The court reasoned that the evidence was relevant to whether petitioner was serious or joking when he made the threat: "A person who says he is going to bomb a building is more likely to give the impression he is serious if he actually *is* serious—if he actually plans to carry out his

threat and is able to do so." *Id.* at 12a-13a. The court concluded that the evidence was "highly relevant" because, at petitioner's request, the jury had to find that petitioner "intended his statement to be understood" as a threat in order to convict. *Id.* at 17a. Although it noted its belief that the courts are not in accord over whether a true threat is purely objective or whether this Court's decision in *Black* introduced a subjective element into the test, the court ruled that it "need not resolve the issue here" because petitioner "put his intent" at issue by "ask[ing] the district court to instruct the jury on his intent." *Id.* at 14a-17a. For similar reasons, the court also rejected petitioner's argument that such contextual background information is not relevant if the recipient of the threat is unaware of it. *Id.* at 17a-20a. Finally, the court held that the district court abused its discretion in admitting *The Anarchist Cookbook* in its entirety because portions of the book had nothing to do with explosives, and was therefore more prejudicial than probative, but it concluded that the error was harmless. *Id.* at 20a-22a.

The court agreed with petitioner on one of his sentencing claims, holding that the district court improperly applied a 12-level enhancement, under Sentencing Guidelines § 3A1.4(a), for an "offense * * * that involved, or was intended to promote, a federal crime of terrorism." Pet. App. 24a-26a. Because the court remanded for resentencing on that basis, it did not reach the government's cross-appeal, which challenged petitioner's below-Guidelines sentence as unreasonable. *Id.* at 26a-27a.

ARGUMENT

1. As an initial matter, this Court's review is unwarranted at this time because this case is in an interlocutory posture. The court of appeals vacated petitioner's sentence and remanded for resentencing. Following the district court's disposition of the case on remand, petitioner will be able to raise the instant claims—together with any other claims that may arise on remand—in a single petition for a writ of certiorari seeking review of the final judgment against him. The interlocutory posture of the case "of itself alone furnishe[s] sufficient ground for the denial" of the petition. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., respecting the denial of the petition).

2. Petitioner contends (Pet. 16-35) that the circuits are in conflict on "[w]hether the 'true threat' doctrine, as articulated by this Court in *Virginia* v. *Black*, 538 U.S. 343 (2003), requires a speaker to have a subjective intent to threaten in order for the speech to be constitutionally proscribable under the First Amendment, or whether the speech need only be objectively threatening." Pet. i. This case does not present an occasion for resolving the purported conflict, as the jury was required to find that both standards were satisfied, and no further review is warranted.

a. Section 2332a(a)(3) makes it unlawful to "threaten[] * * * to use, a weapon of mass destruction * * * against any property that is owned, leased or used by the United States or by any department or agency of the United States." 18 U.S.C. 2332a(a)(3) (2000 & Supp. III 2003). Because Section 2332a(a)(3) targets communications, it "must be interpreted with

the commands of the First Amendment clearly in mind." *Watts* v. *United States*, 394 U.S. 705, 707 (1969) (per curiam). Accordingly, like other statutes that target threatening communications, Section 2332a(a)(3) reaches only "true 'threat[s].'" *Id.* at 708. It does not reach "political hyperbole" or "vehement," "caustic," or "unpleasantly sharp attacks" that fall short of true threats. *Ibid.* Once Section 2332a(a)(3) is confined to true threats, its application is consistent with the First Amendment. As the Court has explained, true threats are "outside the First Amendment," *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 388 (1992), and "[t]he speaker need not actually intend to carry out the threat." *Black*, 538 U.S. at 359-360.

Although petitioner relies on *Black* (*e.g.*, Pet. 18), that case did not present the question whether a subjective intent to threaten is always required to satisfy the First Amendment. This Court held that a Virginia statute prohibiting cross burning with "an intent to intimidate," *Black*, 538 U.S. at 347 (quoting Va. Code Ann. § 18.2-423 (1996)), was not unconstitutionally content-based, but a plurality concluded that the statute's provision that the burning of a cross was "prima facie evidence of an intent to intimidate," *id.* at 363 (plurality opinion) (quoting Va Code Ann. § 18.2-423 (1996)), impermissibly diluted the statutory requirement of an intent to intimidate, *id.* at 364-367 (plurality opinion). The Court observed that "'[t]rue threats' *encompass* those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence," *id.* at 359 (emphasis added), and that a statement made "with the intent of placing the victim in fear of bodily harm or death" is a "*type* of true threat," *id.* at 360 (emphasis added). But *Black* did not hold that

the category of true threats is limited to such statements. The Court had no occasion to consider whether the fear and disruption brought about by true threats justify a prohibition of such statements when a person knowingly making statements would reasonably understand them as expressing a serious intent to do harm.

In this case, the district court instructed the jury that it had to find that petitioner made a "true threat." Pet. App. 97a. The court explained that petitioner's statement had to be "made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to use a weapon of mass destruction to damage Reuss Federal Plaza." *Id.* at 97a-98a. At petitioner's request, *id.* at 17a, the court further instructed the jury that it had to find that petitioner "intended his statement to be understood in that manner." *Id.* at 98a. Accordingly, even assuming that *Black* articulated a subjective-intent requirement for a "true threat," see *Black*, 538 U.S. at 359, the jury instructions in this case satisfied that requirement.

b. Petitioner contends (Pet. 18) that, since *Black*, the courts of appeals have divided on what the government must show to prove a "true threat." No review of that claim is currently warranted.

As was the case before *Black*, a majority of the courts of appeals have interpreted various federal threat statutes to reach communications that, objectively viewed, constitute "true threats," without requiring the government to prove that the defendant specifically intended for the statement to be taken as a threat. See, *e.g.*, *United States* v. *Nishnianidze*, 342 F.3d 6, 15-17 (1st Cir. 2003), cert. denied, 540 U.S. 1132 (2004);

United States v. *Davila*, 461 F.3d 298, 304-305 (2d Cir. 2006), cert. denied, 549 U.S. 1266 (2007); *United States* v. *Guevara*, 408 F.3d 252, 257-258 (5th Cir. 2005), cert. denied, 546 U.S. 1115 (2006); *United States* v. *Hankins*, 195 Fed. Appx. 295, 301 (6th Cir. 2006) (per curiam); *United States* v. *Stewart*, 411 F.3d 825, 827-828 (7th Cir.), cert. denied, 546 U.S. 980 (2005); *United States* v. *Alaboud*, 347 F.3d 1293, 1297-1298 (11th Cir. 2003); see also *United States* v. *Himelwright*, 42 F.3d 777, 782 (3d Cir. 1994) (pre-*Black* decision); *United States* v. *Darby*, 37 F.3d 1059, 1063-1066 (4th Cir. 1994) (same), cert. denied, 514 U.S. 1097 (1995); *United States* v. *Patrick*, 117 F.3d 375, 377 (8th Cir. 1997) (same); *United States* v. *Welch*, 745 F.2d 614, 619-620 (10th Cir. 1984) (same), cert. denied, 470 U.S. 1006 (1985). That interpretation is correct. The text of threat statutes such as Section 2332a contains no requirement that the government prove that the defendant subjectively intended for his communication to be regarded as a threat. And a requirement of subjective intent to threaten would undermine the purposes that are served by a prohibition against threats. In addition to protecting persons from the possibility that threatened violence will occur, a prohibition against threats "protect[s] individuals from the fear of violence" and "from the disruption that fear engenders." *R.A.V.*, 505 U.S. at 388; see *Black*, 538 U.S. at 360 (quoting same). A statement that a reasonable person would regard as a threat creates fear and disruption, regardless of whether the speaker intended for the statement to be regarded as a threat.

None of those circuits has held that *Black* altered the objective standard for "true threats." See Pet. App. 17a ("We need not resolve the issue here."); *United States* v. *Cope*, 283 Fed. Appx. 384, 389 (6th Cir. 2008) (concluding

that it need not decide whether *Black* requires adding a subjective-intent requirement to "threat statutes * * * that do not already contain such a requirement"); *United States* v. *Floyd*, 458 F.3d 844, 848 (8th Cir. 2006) (adhering to post-*Black* precedent that "specifically noted that the intent of the sender is not an element of a section 876(c) offense") (citing *United States* v. *Koski*, 424 F.3d 812, 817 (8th Cir. 2005)), cert. denied, 549 U.S. 1236 (2007).[1] Contrary to petitioner's contention (Pet. 22, 28), the Tenth Circuit in *United States* v. *Magleby*, 420 F.3d 1136 (2005), cert. denied, 547 U.S. 1097 (2006), did not "depart[] from its 'reasonable speaker test'" (Pet. 28). Although the Tenth Circuit did cite *Black* for the proposition that "[t]he threat must be made 'with the intent of placing the victim in fear of bodily harm or death,'" *id.* at 1139 (quoting *Black*, 538 U.S. at 360), that statement was dicta. The court was reviewing petitioner's claim on collateral review that his appellate counsel rendered ineffective assistance by failing to challenge the jury instructions on the ground that they did not "convey that he could be convicted only if his cross burning constituted a threat of unlawful violence to identifiable persons." *Ibid.* The court's decision did not turn on whether subjective intent to threaten is required for a "true threat." *Id.* at 1141-1143.[2]

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[1] The court noted that only the en banc court could correct whether its reasoning in *Koski* was "faulty in light of *Black*." *Floyd*, 458 F.3d at 848. The Eighth Circuit subsequently denied the *Floyd* defendants' petition for rehearing en banc.

[2] In *United States* v. *Pinson*, 542 F.3d 822 (10th Cir.), cert. denied, 129 S. Ct. 657 (2008), the court, in reviewing the jury instructions in a prosecution under 18 U.S.C. 871, stated that "[o]ur Court, like most others, employs an objective standard to evaluate whether a defendant 'willfully' made a threat." *Pinson*, 542 F.3d at 831-832. Although the

As was true before *Black*, the Ninth Circuit has failed to establish a consistent standard. In *United States* v. *Cassel*, 408 F.3d 622 (2005), the court of appeals held that, in order to obtain a conviction for intimidating a person from bidding on federal land in violation of 18 U.S.C. 1860, the government must prove an intent to intimidate. After canvassing its prior decisions and noting their inconsistency, the Ninth Circuit concluded that, under *Black*, "speech may be deemed unprotected by the First Amendment as a 'true threat' only upon proof that the speaker subjectively intended the speech as a threat." *Cassel*, 408 F.3d at 633. After *Cassel*, however, the Ninth Circuit reaffirmed its earlier holding that, in order to prove a threat against the President in violation of 18 U.S.C. 871(a), the government need only establish that a reasonable person would view the statement as threatening. *United States* v. *Romo*, 413 F.3d 1044, 1051 & n.6 (2005), cert. denied, 547 U.S. 1048 (2006). The court explained that *Cassel* "did not address whether statutes like 18 U.S.C. § 871(a) require intent." *Id.* at 1051 n.6. Most recently, the Ninth Circuit has noted that "[t]his circuit has thus far avoided deciding whether to use an objective or subjective standard in determining whether there has been a 'true threat,'" and that, since *Black*, it has "analyzed speech under both an objective and a subjective standard." *Fogel* v. *Collins*, 531 F.3d 824, 831 (2008).

Thus, as matters currently stand, a majority of the circuits apply an objective standard to measure "true

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court also stated that "[t]he burden is on the prosecution to show that the defendant understood and meant his words as a threat, and not as a joke," *id.* at 832, that language is at most dicta, because the issue on appeal was whether the instructions required that the jury find that the defendant actually intended to carry out the threat, *ibid.*

threats." And with the exception of the Ninth Circuit—in which the law is in a state of flux—no court of appeals has squarely held that *Black* altered that standard. There is therefore no conflict in the circuits that warrants this Court's review at this time.

c. Even if the question whether a "true threat" requires a speaker to have a subjective intent to threaten would otherwise merit this Court's review, this case is not a suitable vehicle to resolve that question, for several reasons. First, the court of appeals did not reach it. Instead, it expressly left open whether *Black* redefined the constitutional requirements for a "true threat." Pet. App. 16a-17a. Second, as the court of appeals noted (*id.* at 17a), the district court gave a subjective-intent instruction at petitioner's request, and petitioner expressly disclaimed any objection to the "true threat" instruction on appeal. *Ibid.* Third, petitioner would not benefit from the resolution of any purported conflict in the circuits because the verdict demonstrated that petitioner's communication was a true threat under either the subjective or the objective standards. Further review is not warranted.

3. Petitioner also challenges (Pet. 34-42) the admissibility of evidence of his statements and conduct before the date of his recorded conversation with Schultz. That claim does not warrant further review.

As an initial matter, petitioner's contention that his evidentiary claim warrants this Court's review is largely dependent on his claim that the courts below applied the wrong standard to assess whether his statements were "true threats." See Pet. 35 (describing the evidentiary consequences as the "crux" of the infirmity with the court's standard). For the reasons stated above, that claim does not merit this Court's review, and there is no

reason to conclude that petitioner's evidentiary claim is independently certworthy.

In any event, the decision below is correct. As the court noted, petitioner put his intent at issue by requesting an instruction that required the jury to find that he "*intended* that his statements be understood as a threat." Pet. App. 13a. The court of appeals applied basic evidentiary principles to hold that the evidence of petitioner's past conduct and statements was probative of that intent. That ruling is consistent with those of other courts of appeals, and petitioner does not claim otherwise. See *United States* v. *Sutcliffe*, 505 F.3d 944, 958-959 (9th Cir. 2007) (distinguishing cases where intent was not required, and holding that district court did not abuse its discretion in admitting evidence of defendant's prior weapon possession to rebut defendant's claim that his threatening statements were ambiguous and to demonstrate that he actually intended to threaten violence); *United States* v. *Sovie*, 122 F.3d 122, 126 (2d Cir. 1997) (holding that evidence that defendant physically abused ex-wives was admissible to show that defendant intended to communicate threat of injury to victim of charged threat); cf. *Koski*, 424 F.3d at 818 (holding that prior conviction for mailing threatening communications was admissible to rebut defendant's defense that his threats were "cr[ies] for help" and to show that he "was aware that his previous correspondence had been found threatening"). See generally *Huddleston* v. *United States*, 485 U.S. 681, 685 (1988) ("Extrinsic acts evidence may be critical to the establishment of the truth as to a disputed issue, especially when that issue involves the actor's state of mind and the only means of ascertaining that mental state is by drawing inferences from conduct.").

Petitioner further contends (Pet. 38-39) that the court of appeals erred in concluding that "[c]ontextual information" about a defendant is "potentially admissible" even when the recipient of the threat is unaware of that information. Pet. App. 20a. As this Court has recognized, the meaning of a communication—and, in particular, whether a communication can reasonably be regarded as a serious threat of harm—requires consideration of context. See *Black*, 538 U.S. at 360; *id.* at 367 (plurality opinion) (analyzing message of intimidation of cross burning in light of the "history of cross burning in this country" and invalidating Virginia cross-burning statute because its prima facie evidence provision, which permits a finding of an intent to intimidate based solely on the act of cross burning, "ignores all the contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate"); *Watts*, 394 U.S. at 708 (determining whether a statement was a "true 'threat' " under 18 U.S.C. 871(a) in light of the "context" of the statement); see *United States* v. *Viefhaus*, 168 F.3d 392, 397-398 (10th Cir.) (evidence of racially inflammatory material seized from defendant's home was admissible to show context in which defendant made his threatening remarks recorded on hotline operated by white supremacists), cert. denied, 527 U.S. 1040 (1999). And limiting instructions protect against the jury's improper use of such evidence.[3]

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[3] The district court below gave the jury cautionary instructions, explaining that the extrinsic evidence should be considered solely on the question of knowledge and intent; that petitioner's right to express subversive views was protected by the First Amendment; and that the jury should not convict petitioner on the basis of his political views. Pet. App. 93a-94a.

Even assuming that the evidence here was improperly admitted, any error was harmless. The evidence generally duplicated petitioner's statements to Schultz, including his admission that he committed arson and told a woman (who subsequently testified) that he was going to blow up a building, Pet. C.A. App. Tab 7, at 16, 73, 97-98, 115-116; see Pet. App. 7a; his descriptions of explosives that he designed or actually detonated, Pet. C.A. App. Tab 7, at 58-60, 71-72, 75, 77, 79-81, 96, including one that could have killed petitioner and blown up his house, *id.* at 37-38; another that "lifted the roof off the building and moved it about six inches," *id.* at 46-47, and a third that would have exploded in the victim's face when she opened a can of Noxzema face cream because he "was out to disfigure someone," *id.* at 61-65; his possession of books, including *The Anarchist Cookbook*, that instructed the reader on how to make a bomb and his possession of bomb-making ingredients and equipment, *id.* at 22-23, 33-36, 50-51, 68;[4] his application of his chemistry knowledge to bomb making, *id.* at 25-32; his knowledge of Kaczynski's bombs and his own nickname of "Uni," *id.* at 72, 95; his anti-government beliefs, *id.* at 73, 99-101; and his desire to be "the next McVeigh," *id.* at 101.

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[4] The court of appeals held that portions of *The Anarchist Cookbook*, including those referring to homemade explosives, were relevant and admissible, even though other portions (referring, for example, to drugs and other weapons) were not. Pet. App. 21a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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